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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-____

~~72-309~~

HOWARD MARK SANDLER,

Petitioner,

v.

NATIONAL DIRECTOR OF SELECTIVE SERVICE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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v.

NATIONAL DIRECTOR OF SELECTIVE SERVICE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Howard Mark Sandler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 25, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra* at 44-46), has not yet been reported. The two opinions of the United States District Court for the District of Maryland (App. B, *infra* at 28-44) were not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1972. A timely petition for rehearing was denied on July 5, 1972 (App. B, *infra* at 46). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an induction order was void because issued and continued in effect by the Selective Service in disobedience of the express mandate of a federal court judgment, even though that judgment was later reversed on appeal.

2. Whether Rule 23, Federal Rules of Civil Procedure, permits a District Court to dispense with formal notice to members of a class who are represented but not named as parties to the litigation.

3. Whether the District Court had original jurisdiction under 28 U.S.C. §1361 to issue an order in the nature of mandamus to compel the National Director of Selective Service to perform mandatory duties owed to a registrant, notwithstanding the apparent bar of 50 U.S.C. §460(b)(3) to pre-induction judicial review.

STATUTES, REGULATIONS AND RULE OF COURT INVOLVED

This case involves the interpretation or application of 28 U.S.C. §1361 and Sections 6(h)(2) and 10(b)(3) of the Military Selective Servica Act of 1967, 85 Stat. 348, 50 U.S.C. §§456(h)(2) and 460(b)(3) (Supp. IV, 1969), as well as certain Selective Service Regulations which are codified as 32 C.F.R. §§1604.1, 1622.60, 1625.3, 1626.1, 1626.41, 1626.61(a), and 1627.1(a) (Jan. 1, 1972) and 32 C.F.R. §1622.30(a) (Jan. 1, 1970). Also involved are the provisions of Rule 23, Federal Rules of Civil Procedure. These are reprinted in pertinent part in App. A, *infra* at 21-27.

STATEMENT OF THE CASE

Petitioner is a member of a class of Selective Service registrants who are fathers of a child or children with whom they maintain a bona fide relationship in their homes and who have received *graduate*, but not undergraduate II-S deferments since June 30, 1967. They applied for and were denied the fatherhood III-A deferments under Selective Service Regulation 1622.30(a), 32 C.F.R. §1622.30(a) (Jan. 1, 1970) [hereinafter such regulations are cited as SSR, with number], which contained a provision rendering ineligible for III-A classification any registrant who had received a II-S deferment after June 30, 1967.

Accordingly, several members of the class brought an action in the United States District Court for the Eastern District of Michigan, on behalf of themselves and others similarly situated, against the National Director of Selective Service and various state directors and local boards. They sought a declaratory judgment that the disqualifying provision in SSR 1622.30(a), properly interpreted, was contrary to the Military Selective Service Act of 1967, 50 U.S.C. App. §450 *et seq.* and therefore invalid. As additional relief they sought an order in the nature of mandamus directing that the III-A deferment be granted to them and to members of the class which they represented, invoking jurisdiction *inter alia* under 28 U.S.C. §1361.

The District Court upheld these contentions on the merits, declared that it had jurisdiction of the subject matter and that SSR 1622.30(a), creating a mandatory III-A classification for fathers, was invalid to the extent that it denied such classification to registrants who had held *graduate* II-S deferments. *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1969), reprinted in full in App. C, *infra* at 47-54.

On February 27, 1970, the District Court entered an order defining the class of registrants and authorizing the case to proceed as a class action under Rule 23(b)(1) and (2), Federal Rules of Civil Procedure. *Gregory v. Hershey*, 51 F.R.D. 188 (E.D. Mich. 1970), reprinted in full in App. C, *infra* at 44-45. Formal notification of members of the class was held to be impractical and was not required by the order. *Id*, 189.

On the same date, the District Court entered final judgment (App. C, *infra* at 55-57) which approved the class action, defined the class, recited the court's jurisdiction, and declared that the named plaintiffs "and all others similarly situated are entitled to fatherhood III-A deferments as a matter of law." *Id.* 189-190. By order in the nature of mandamus, the District Court directed the National Director to classify plaintiffs and "all others similarly situated to plaintiffs III-A upon showing that they are members of the class as hereinbefore defined" and to conform his official actions to the declaratory judgment as rendered. *Id.* 190. The National Director thereafter noted an appeal to the United States Court of Appeals for the Sixth Circuit, but neither applied to that court nor obtained a stay of mandate pending appeal.

Petitioner Sandler, a Maryland registrant, was not a named party in *Gregory* but is concededly a member of the class defined therein. He made timely and properly-supported application for a fatherhood III-A deferment by presenting to his local board the necessary facts as well as an actual copy of the *Gregory* judgment.[1] The relevant facts were not in dispute before his local board nor are

[1] Entered in petitioner's Selective Service file as an attachment to his letter of October 7, 1970, filed of record in the courts below as plaintiff's exhibit S.

they now.[2] However, the local board concluded that he was not eligible for a III-A deferment because he had received a II-S deferment after June 30, 1967, while a *graduate* student. This determination was based solely upon the board's reliance upon the disqualifying exception contained in SSR 1622.30(a), which *Gregory* had invalidated. After petitioner exhausted his administrative remedies, including a personal appearance before his local board and a timely appeal, he was ordered to report for induction. On December 17, 1970, while awaiting induction, his case was specially reviewed by the National Director of Selective Service, who instructed the Maryland director as follows:

> Please be advised Mr. Sandler is not eligible for Class III-A (paternity) deferment. Until such time as the *Gregory v. Hershey* case is resolved by higher court action it would appear Mr. Sandler has been properly classified and processed.[3]

On January 22, 1971, prior to the date scheduled for his induction, petitioner filed the present action in the United States District Court for the District of Maryland and obtained a temporary restraining order, later extended by consent, enjoining the National Director and others[4] from enforcing the induction order. In his verified complaint, jurisdiction was predicated upon 28 U.S.C. §§1331, 1361, 1651, 2201, and 2202. Petitioner sought injunctive relief and an order in the nature of mandamus to compel the

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[2] As much was conceded below by respondents. Brief for Appellees, at 2. The salient details, derived exclusively from petitioner's Selective Service file, were accurately summarized in the District Court's opinion of July 27, 1971. App. B, *infra* at 28-30.

[3] Letter of December 17, 1970, filed of record as plaintiff's exhibit V.

[4] The other respondents are Colonel James L. Hays, III, State Director, Selective Service System; Local Board No. 34, Reisterstown, Maryland; James D. Laudeman, Jr., Herbert Brown, Edward A. Halle, and William F. Mosner, members of Local Board No. 34; Local Board No. 21, Nashville, Tennessee.

National Director and other respondents to reclassify him III-A and to cancel his induction order. The action was grounded upon two distinct theories. The first count alleged that petitioner was entitled to a III-A deferment as a matter of law in accordance with the statutes and regulations construed in *Gregory*. The second count claimed that petitioner, as a member of the class defined in *Gregory*, was entitled to enforce the mandamus order of the Michigan court against the National Director and to have his induction order declared void on the ground that it was issued in disobedience of the express mandate of the *Gregory* judgment.

Four days later, on January 26, 1971, the Sixth Circuit reversed that judgment, *Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971), reprinted in full in App. C, *infra* at 57-63. Its mandate issued on March 1, 1971. This Court denied certiorari, Mr. Justice Douglas dissenting, 403 U.S. 922. On July 27, 1971, the Maryland district court sustained the validity of the disqualifying provision in SSR 1622.30 (a) and dismissed the first count on authority of the Sixth Circuit's opinion in *Gregory*. App. B, *infra* at 28-38. On November 3, 1971, the District Court rendered a second opinion disposing of petitioner's second claim, holding that petitioner's right to enforce the *Gregory* mandate against the National Director was extinguished by the Sixth Circuit's reversal of that judgment. Invoking 50 U.S.C. App. §460(b)(3), the action was dismissed for want of jurisdiction. App. B, *infra* at 38-44.

On May 25, 1972, the Fourth Circuit affirmed *per curiam* on the opinions of the District Court, holding by quotation from *Pasquier v. Tarr*, 444 F.2d 116, 117 (5th Cir. 1971), that the *Gregory* mandate "collapsed, both for the parties and the members of the class, following its reversal by the United States Court of Appeals for the Sixth Circuit in *Gregory v. Tarr*, 6 Cir., 1971, 436 F.2d 513." App. B,

infra at 44-46. A timely petition for rehearing was denied on July 5, 1972. App. B, *infra* at 46. Only July 10, 1972, the Court of Appeals stayed its mandate pending review on certiorari. App. B, *infra* at 46.

REASONS FOR GRANTING THE WRIT

I.

Although somewhat obscured by the *per curiam* opinion below, this case is of substantial public importance which transcends the workings of the Selective Service System. The deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based. Here the National Director of Selective Service felt that he could ignore with impunity a specific, non-frivolous court order directed at him, simply because he disagreed with its terms. That order did not merely admonish the National Director, as a party to the *Gregory* litigation, to end his lawless policy of withholding III-A deferments from graduate students. It commanded him to take affirmative steps to grant those deferments, utilizing all of the weapons at his command. That the National Director was in a position to comply with the mandate, by issuing appropriate directives to local boards, cannot be doubted. See texts of SSR 1604.1, 1622.60, 1625.3, 1626.1, 1626.41, 1626.61(a), and 1627.1(a), reprinted in pertinent part in App. A, *infra*. at 23-25.[5]

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[5] SSR 1622.60 is especially unambiguous in its provisions: "The Director of Selective Service, notwithstanding any other provisions of the regulations in this chapter, may direct that any registrant shall be classified or reclassified without regard to his eligibility for a particular classification." See *Nestor v. Hershey*, 425 F.2d 504, 521 (D.C. Cir. 1969). And SSR 1625.3 empowered the National Director to order petitioner's local board to reopen his classification, thereby automatically cancelling his pending induction order. "This

Not only did the National Director flagrantly disregard that mandate by mere inaction, but he went so far as to declare petitioner ineligible because *Gregory* had not been "resolved by higher court action". Maryland Selective Service authorities were thus instructed to ignore *Gregory* and to proceed with petitioner's induction, as scheduled. In issuing such advice the National Director breached his "affirmative duty not to mislead and to give clear and correct advice when requested to do so." *United States v. Fisher*, 442 F.2d 109, 114 (7th Cir. 1971). See SSR 1604.1(b). "Whatever it [was] in law, it purport[ed] to be an authoritative declaration of policy issued for the guidance of the System's line officers." *Nestor v. Hershey*, 425 F.2d 504, 521 (D.C. Cir. 1969); *National Student Association, Inc. v. Hershey*, 412 F.2d 1103, 1115 (D.C. Cir. 1969). This improper advice to subordinates,[6] while the *Gregory* mandate was in full force and effect, brings this case into clear conflict with *Clay v. United States*, 403 U.S. 698 (1971), and *Sicurella v. United States*, 348 U.S. 385 (1955).

Unfortunately for the administration of justice, the Court of Appeals chose to overlook respondents' deliberate flouting of the *Gregory* mandate on the theory that the mandate "collapsed, both for the parties and the members of the class, following its reversal" by the Sixth Circuit. App. B, *infra* at 45-46. That theory is repugnant to the immutable

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regulation is couched in broad terms and places no time limit on the [National] Director's power to act." *United States v. Lloyd*, 431 F.2d 160, 171 (9th Cir. 1970).

[6] In another context the Ninth Circuit has said "[N]othing occurred after the definitive judicial decision which cast any doubt upon its continuing vitality. The blatant disregard of the court's decision, evidenced by a letter from the State Director to the Local Board attempting, in essence, to refute the court's interpretation * * * places this case in a unique posture." *United States v. Hayden*, 445 F.2d 1365, 1379 (9th Cir. 1971).

principle established by the decisions of this Court that vindication on appeal is no excuse for past violations of a binding court order. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967). *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922); *United States v. Shipp*, 203 U.S. 563, 573 (1906); *Hovey v. McDonald*, 109 U.S. 150, 159-162 (1883).[7] And *Gregory*, despite its later reversal, "is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Walker v. City of Birmingham, supra*. The original holding on the merits, even after its reversal by the Sixth Circuit, still commands the respect of at least two circuits. E.g., *Plotner v. Resor*, 446 F.2d 1066 (5th Cir. 1971); *Hunt v. Local Board No. 197*, 438 F.2d 1128 (3rd Cir. 1971) (en banc). Accordingly, the terms of the *Gregory* mandate "were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise." *United States v. United Mine Workers, supra*.

II.

Seldom does this Court have occasion to review a case of conceded and open defiance of a federal court order by a prominent officer of the executive branch, appointed by the President and confirmed by the Senate.[8] That it was the National Director of Selective Service, rather than an ordinary litigant, who flouted judicial authority does not

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[7] And see *Brown v. Coumanis*, 135 F.2d 163 (5th Cir. 1943) (setting aside injunction for lack of subject-matter jurisdiction); *Carter v. United States*, 135 F.2d 858 (5th Cir. 1943) (upholding contempt proceedings based on violation of *Brown* injunction).

[8] Section 10(a)(3) of the Military Selective Service Act of 1967, 50 U.S.C. §460(a)(3). As this Court said in *Walker v. City of Birmingham*, 388 U.S. 307, 320-321 (1967), "in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion."

lessen the efficacy of the *United Mine Workers* rule, especially because executive disobedience of court orders undermines the separation of governmental powers reflected in the Judicial Article (III) of the Constitution. The words of the late Judge Prettyman, spoken in reference to a former Secretary of Commerce, are especially instructive in the present context:

> There can be little doubt of the teachings of that *[United Mine Workers]* case. An order issued by a court having jurisdiction of the persons and the subject matter must be obeyed, even though the defendants may sincerely believe that the order is ineffective and will finally be vacated, even though the Act on which the order is based is void, even though the order is actually set aside on appeal, even though the basic action becomes moot. This must be the rule * * * because of the necessities of orderly process under our constitutional system of government. Those necessities override every feeling of loyalty to leaders, or doubt as to validity, or of outrage as to the determination, or of shock as to consequence.
>
> * * * The respondent parties are alleged to be making themselves judges of the decree issued by the court. They believe that decree erroneous. They are alleged to believe that they can eventually in some other proceeding have the decree set aside. But none of those considerations, however sincerely entertained, can justify failure of the persons before us to comply with the decree, or minimize the duty of the court to compel compliance. The law which the Courts applied to Lewis and the Miners is equally applicable to agents of the Government.

Land v. Dollar, 190 F.2d 366, 379 (D.C. Cir. 1951), cert. dismissed 344 U.S. 806 (1952).

The Michigan court in *Gregory* was exercising its powers under the Judiciary Article of the Constitution when it con-

strued the Military Selective Service Act and regulations promulgated thereunder as imposing a mandatory duty upon the National Director to remove the impediment to III-A deferments. Whether or not the National Director agreed with that construction, as an officer sworn to uphold the law he was constitutionally bound to defer to it while awaiting the decision of the Sixth Circuit. He may have been correct in believing that lower federal courts are not to sit as super-draft boards. However, it "is equally true that the National Director of Selective Service is not to sit as the Court of Appeals for the Sixth Circuit."[9]

This executive invasion into the domain of the federal judiciary is a matter too grave to escape consideration by this Court, "for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judiciary department." *Commonwealth of Kentucky v. Dennison*, 24 How. 66, 104 (1861). These constitutional precepts would lose their force if, as was permitted below, the executive branch may pick and choose which mandates it will obey. It is time for this Court to declare once again: "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned, or refused full faith and credit by another Department of Government." *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

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[9] *Whitmore v. Tarr*, 331 F. Supp. 1369, 1371 (D. Neb. 1971); *Schrader v. Selective Service System Local Board No. 76 of Wisconsin*, 328 F. Supp. 891, 892 (W.D. Wis. 1971), reversed on other grounds, No. 71-1767 (7th Cir. July 28, 1972).

III.

By its reliance upon *Pasquier v. Tarr*, 444 F.2d 116 (5th Cir. 1971), the court below betrayed its misconception of the central issue in this case.[10] We did not contend in the Court of Appeals, nor do we here, that petitioner or any other member of the class is presently entitled to a III-A deferment on the basis of res judicata. As *Pasquier* holds, the *Gregory* judgment "collapsed, both for the parties and the members of the class, following its reversal by the United States Court of Appeals for the Sixth Circuit in *Gregory v. Tarr*, 6 Cir., 1971, 436 F.2d 513." *Id*, 117.

That is not the issue here. Before the judgment "collapsed" by reversal, it was in full force and effect. The National Director was under an affirmative duty, when asked, to instruct petitioner's local board to reopen his classification and to cancel the pending induction order. The issue before this Court, presented but evaded below, is whether petitioner must *now* respond to an induction order issued and maintained in defiance of the unstayed mandate in *Gregory* prior to its reversal. If his induction order was invalid before January 26, 1971, subsequent developments in the Sixth Circuit could not give it retroactive validity. *United States v. Simmons*, 348 U.S. 397, 406 (1954). See *United States v. Rundle*, 413 F.2d 329, 334 (8th Cir. 1969); *Nestor v. Hershey*, 425 F.2d 504, 526 (D.C. Cir. 1969).

IV.

The inability of the Court of Appeals to acknowledge governmental disrespect for the orderly processes of the federal judicial system would call for the exercise of this Court's power of supervision, even if only the rights of

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[10] The likelihood that the Court of Appeals failed to grasp the issue is manifest. Its opinion is three sentences long. It quotes at length the *current* version of SSR 1622.30(a), providing for *hardship* deferments, which has no bearing on this case.

this one petitioner were at stake. Much more is involved. As conceded below, the National Director not only denied relief to petitioner but also denied relief to the entire *Gregory* class. Because of his dereliction, local boards throughout the United States proceeded to order the induction of registrant fathers, including petitioner, who should have been deferred pursuant to the *Gregory* mandate.

Petitioner's is but the first case to reach this Court which squarely challenges the National Director's disobedience of that mandate. Others are en route. To our knowledge the issue has been litigated in four other circuits. *Schrader v. Selective Service Local Board No. 76 of Wisconsin*, 328 F. Supp. 891 (W.D. Wis. 1971) and 329 F. Supp. 966 (W.D. Wis. 1971), reversed No. 71-1767 (7th Cir. July 28, 1972), reprinted in full in App. D, *infra* at 74-82; *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1971), appeal dismissed No. 71-1714 (8th Cir. Jan. 31, 1972); *Zeilstra v. Hershey*, Civil 6251 (W.D. Mich. Nov. 4, 1971), reprinted in full in App. D, *infra* at 64-73, appeal pending (argued June 6, 1972) *sub nom Zeilstra v. Tarr*, No. 72-1131 (7th Cir.); *Germonprez v. Director of Selective Service*, 318 F. Supp. 829 (D.D.C. 1970), appeals pending, Nos. 71-1381 and 71-1382 (D.C. Cir.). The district court opinions in *Schrader*, *Whitmore*, and *Zeilstra* strongly support the position here advocated.[11] While *Schrader* was reversed by the Seventh Circuit on July 28, 1972, the decision was rendered by a divided panel and provoked a vigorous dissent which deserves attention. See App. D, *infra* at 80-82. A petition for rehearing *en banc* has been filed.[12]

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[11] In *Germonprez*, the registrant was denied leave to amend his complaint to question the National Director's disobedience and that question has been briefed on appeal.

[12] Curiously, not one member of the *Schrader* panel is a judge of the Seventh Circuit in regular active service.

With deference, we find nothing in the majority opinion in *Schrader* or in the conclusion expressed below which casts serious doubt upon the reasoning which prompted the district courts in *Whitmore*, *Zeilstra*, and, indeed, *Schrader* to afford relief to registrants aggrieved by the actions of the National Director.[13] It is for this Court to determine which of the contending viewpoints should prevail. The swirl of judicial disagreement over the ramifications of *Gregory* is itself a compelling reason why this Court should furnish prompt guidance, in order that the lower federal courts may respond with a single voice to this and future transgressions by the National Director.

V.

A subsidiary issue, but one of undeniable importance in the developing area of federal class actions, concerns the proper interpretation of the notice requirements of Rule 23, Federal Rules of Civil Procedure. Respondents insisted below, as they have in all of the companion cases, that *Gregory* was not a valid class action because no provision was made for formal notice to absent members of the class, concededly including petitioner. They contend that the class declaration was thus a nullity and that the mandate of *Gregory* was not binding upon anyone but the named plaintiffs to that action.

Although it is not clear from the opaque opinion below that the Court of Appeals agreed with this argument, the District Court seemed impressed by it (App. B, *infra* at

[13] *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1971), aptly states our position: "The only protection the judicial branch has against impingement upon its authority by the executive branch, other than the traditional contempt power, is to refuse the enforcement by the courts of official actions taken in contravention of judicial power. Consequently, when a member of the executive branch acts contrary to a court order, the acts of the executive are without effect to the extent that they violate the court order." *Id*, 1372-1373.

40-42) and, in view of the majority holding in *Schrader v. Selective Service System Local Board No. 76 of Wisconsin*, No. 71-1767 (7th Cir. July 28, 1972), (App. D, *infra* at 74-80), it is anticipated that respondents will press the point with renewed vigor in opposition to this petition. Therefore, a few comments are in order.

The *Gregory* court determined that the class action should proceed under subparagraphs (b)(1) and (b)(2) of Rule 23, but provided: "Notification of members of the class is impracticable because of the number of members and the absence of any reasonable way of identifying them." See App. C, *infra* at 55. The *Gregory* court concluded that no notice to class members was required because of the permissive language of Rule 23(d)(2), as well as the fact that notice is mandatory under Rule 23(c)(2) only with respect to class actions maintained under subparagraph (b)(3) of the Rule. The National Director did not appeal this ruling. And yet *Schrader* holds that the *Gregory* court erred in dispensing with notice entirely, pointing to dicta in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968) that "* * * notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." Accord: *McCarthy v. Director of Selective Service System*, 322 F. Supp. 1032 (E.D. Wis. 1970), aff'd on other grounds, No. 71-1144 (7th Cir. May 26, 1972); *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970), aff'd on other grounds, 444 F.2d 116 (5th Cir. 1971).

Such a conclusion has potential for grave mischief. First of all, under the plain language of Rule 23, notice to absent members of a (b)(1) or (b)(2) is discretionary with the trial judge. To engraft a compulsory notice requirement on Rule 23(b)(1) or (b)(2), upon a due process hypo-

thesis, is tantamount to holding Rule 23 (as formulated by this Court) to be unconstitutional.

Second, if mandatory notice is thought to be necessary, to what end? Even if each registrant had been notified of *Gregory*, as a member of a (b)(1) or (b)(2) class he would have had no right to intervene or request exclusion. *Mungin v. Florida East Coast Ry. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970), aff'd 441 F.2d 728 (5th Cir. 1971); *Collins v. Bolton*, 287 F. Supp. 393, 399 (N.D. Ill. 1968). Since members of a (b)(1) or (b)(2) suit have absolutely no right to "opt out" or intervene, it would have been wholly senseless to notify them of such nonexistent right. *Mungin v. Florida East Coast Ry. Co., supra.*

Third, as the leading commentator has flatly declared, "the *Eisen* position is not sound" and notice is not required in (b)(1) and (b)(2) actions if the class is adequately represented. 3B Moore FEDERAL PRACTICE ¶23.55, at 23-1152. See *Hansberry v. Lee*, 311 U.S. 32 (1940). Support for this view may be found in cases holding in such actions that notice is a matter of informed discretion. E.g., *Mungin v. Florida East Coast Ry. Co., supra; Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968), aff'd 441 F.2d 704 (10th Cir. 1971); *Johnson v. City of Baton Rouge*, 50 F.R.D. 295, 301 (E.D. La. 1970).

Fourth, the *Gregory* court not only exercised its discretion to dispense with notice but found as a fact that "the representative parties will fairly and adequately represent the interests of the class" (App. C, *infra* at 54). Furthermore, the defendants in *Gregory*, including the National Director, chose not to question the validity of the class action in that litigation, either at the trial level or on appeal. See *Gregory v. Tarr*, 436 F.2d 513, 514 n.2 (6th Cir.

1971) (App. C, *infra* at 58). We are unaware of any cognizable basis for the National Director's present collateral attack upon the fully-adjudicated decision in *Gregory*.[14]

Finally, apart from his waiver in *Gregory*, the National Director obviously lacks standing to complain that absent members were denied due process by not being afforded notice. A cynical attempt to impugn a class action, once established, as one court observes, is "naturally suspect". *Rosado v. Wyman*, 322 F. Supp. 1173, 1192 (S.D. N.Y.), aff'd 437 F.2d 619 (2d Cir. 1970), aff'd 402 U.S. 991 (1971). After all the National Director, a party to the instant case as well as to *Gregory*, had notice of the class action and of the mandate which he so blatantly violated. His belated concern for the due process rights of absent class members, including petitioner, deserves scant consideration.

VI.

Last term's decision in *Fein v. Selective Service System Local Board No. 7*, 405 U.S. 365 (1972), leaves unresolved the jurisdictional question posed by this litigation: whether the willful disobedience of a federal court mandate is such lawless conduct as to overcome the bar of Sec-

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[14] As the dissenting judge said in *Schrader*: "[C]ourts of collateral jurisdiction are bound by the pronouncements of the initial forum's determination regarding the class and are not free to attack the class nature of the suit once it has been judicially determined. Therefore, those cases finding *Gregory*, *supra*, inapplicable to absent class members should have accepted Judge Smith's factual determination and refrained from relitigating that issue. In fact, had the National Director properly carried out the unstayed mandate of *Gregory*, *supra*, those cases, including this one, which reopened the class action determination by Judge Smith, would never have existed — at least until *Gregory* was reversed on appeal. If the National Director disagreed with the decision of the district Court in *Gregory*, his sole remedy lay with the Sixth Circuit Court of Appeals." App. D, *infra* at 82. See *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1971).

tion 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3), which seemingly prohibits "judicial review * * * of the classification or processing of any registrant * * *."

Fein described two categories which had evolved from this Court's prior constructions of Section 10(b)(3). The first category, for which pre-induction judicial review is permissible, is "where administrative action based on reasons unrelated to the merits of the claim to exemption or deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute." The second category, for which pre-induction review is precluded, is "where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant." *Id*, 374-375.

This case does not fall neatly into either category. Obviously, the second category is inapplicable because no discretion or factual determination was involved; petitioner's claim is founded upon the National Director's disregard of a mandamus order which inherently presupposed an absence of discretion. By the same token, however, petitioner's claim is not founded upon a *statutory* command but rests upon the mandatory "shall" provision of SSR 1622.30(a), as construed and enforced by an order in the nature of mandamus to reclassify registrants in petitioner's class. There is ample authority, resting upon the prior decisions of this court, for the proposition that:

> Pre-induction judicial review will always lie * * * where the facts are uncontested, no discretion is involved, and the applicable "law" is clear. But whether that "law" involves statute, *court decision or regulation* is as irrelevant as whether it involves an "exemption" or a "deferment".

Shea v. Mitchell, 421 F.2d 1162, 1165-1166 (D.C. Cir. 1970) (italics added). See also *Naskiewicz v. Lawver*, 456 F.2d 1166 (2d Cir. 1972) (holding that a claimed violation of a regulation meets the test of *Fein*); *Hunt v. Local Board No. 197*, 438 F.2d 1128 (3rd Cir. 1971) (regulation, as construed by this Court). And see *Zeilstra v. Hershey*, No. 6251 (W.D. Mich. 1971) (App. D, *infra* at 64, 66-71). Since the District Court's reliance upon Section (10b)(3) (App. B, *infra* at 38, 41-42) was affirmed below, it placed the Fourth Circuit in clear and unmistakable conflict with a majority of circuits. Review by this Court is surely warranted to resolve the divergent readings of Section 10(b)(3).

Moreover, petitioner filed this action against the National Director *prior* to the reversal of Gregory. Since his action was grounded on the still-viable mandate, the jurisdiction which attached immediately under 28 U.S.C. §1361 could not have been abrogated by the subsequent "collapse" of that mandate. Cf. *Rosado v. Wyman*, 397 U.S. 397, 405 (1970). Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Although this Court has cited Section 1361 on occasion, it has yet to consider the statute's full scope and application, particularly with reference to the apparent bar of Section 10(b)(3). Section 1361 has been invoked as a jurisdictional predicate for pre-induction review. E.g., *Hunt v. Local Board No. 197*, 438 F.2d 1128, 1125 n.2, 1137-1139 (3rd Cir. 1971); *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969); *Waguespack v. Tarr*, 317 F. Supp. 448, 451-452 (E.D. La. 1970). Indeed, it is doubtful that the order in the nature of mandamus sought by petitioner pursuant to Section 1361 even constitutes "judicial review"

with the meaning of Section 10(b)(3). To redress the arbitrary refusal by the National Director to perform a public duty required by the *Gregory* mandate is not to engage in review "of the classification or processing of any registrant by local boards." See *Hunt v. Local Board No. 197*, 438 F.2d 1128, 1135 n.2, 1137, 1139 (3rd Cir. 1971) (concurring opinions). "Rather, it is an exercise of a special and circumscribed power Congress has conferred by the courts [under Section 1361] to protect the individual against arbitrary refusal to perform a public duty owed to the individual." *Id*, 1139.

Our submission is unequivocal: Section 10(b)(3) is inapplicable to properly-stated claims pursuant to Section 1361 for an order in the nature of mandamus:

> Section 10(b)(3)'s rational aim, as stated, is to insulate drafe board decisions from pre-induction judicial review over matters in which draft boards have special competence. But to hold that mandamus power [under Section 1361] is lacking in this case would be to attribute to Congress a design to transfer from courts to draft boards a judicial function in which courts have special competence and draft boards none. Congress meant to obviate courts sitting as super-draft boards but did not mean to authorize draft boards to sit as super-courts.

Crowley v. Pierce, 4 SSLR 3118, 3119 n.2 (M.D. Fla. 1971).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

August, 1972.

APPENDIX A

STATUTES, REGULATIONS, AND RULE OF COURT INVOLVED

The following statutes and regulations involved in this case are set forth verbatim in compliance with Rule 23(1)(d) of the Rules of this Court.

Statutory Provisions

28 U.S.C. §1361 provides as follows:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 6(h)(2) of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(h)(2), provides in pertinent part as follows:

> (2) * * * Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3), provides in pertinent part as follows:

> (3) * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [Section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

SELECTIVE SERVICE REGULATIONS

Selective Service Regulation 1622.30, 32 C.F.R. 1622.30 (Jan. 1, 1970), provided in pertinent part as follows:

CLASS III

§1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classfied in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

* * * * * *

(c)(1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 13 years of age or over unless he is physically or mentally handicapped.

* * * * * *

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with

the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

* * * * * *

Selective Service Regulation 1604.1, 32 C.F.R. §1604.1 (Jan. 1, 1972), provides in pertinent part as follows:

§1604.1. Director of Selective Service.

The Director of Selective Service shall be responsible directly to the President. The Director of Selective Service is hereby authorized and directed:

* * * * * *

(b) To issue such public notices, orders, and instructions as shall be necessary for carrying out the functions of the Selective Service System.

* * * * * *

Selective Service Regulation 1622.60, 32 C.F.R. §1622.60 (Jan. 1, 1972), provides as follows:

§1622.60. Director may direct that eligibility for particular classification be disregarded.

The Director of Selective Service, notwithstanding any other provisions of the regulations in this chapter, may direct that any registrant shall be classified or reclassified without regard for his eligibility for a particular classification.

Selective Service Regulation 1625.3, 32 C.F.R. §1625.3 (Jan. 1, 1972), provides as follows:

§1625.3. When registrant's classification shall be reopened and considered anew.

The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such re-

quest shall immediately cancel any order to report for induction or alternative service which may have been issued to the registrant.

Selective Service Regulation 1626.1, 32 C.F.R. §1626.1 (Jan. 1, 1972), provides as follows:

§1626.1. Appeal by Director and State Director.

* * * * * *

Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time.

Selective Service Regulation 1626.41, 32 C.F.R. §1626.41 (Jan. 1, 1972), provides in pertinent part as follows:

§1626.41. Appeal stays induction.

* * * Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board.

Selective Service Regulation 1626.61(a), 32 C.F.R. §1626.61(a) (Jan. 1, 1972), provides as follows:

§1626.61. Reconsideration of appeal board determination.

(a) When either the Director of Selective Service or the State Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may, at any time, request an appeal board to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request, an appeal board will reconsider its determination in any case.

Selective Service Regulation 1627.1(a), 32 C.F.R. §1627.1(a) (Jan. 1, 1972), provides in pertinent part as follows:

§1627.1. Persons who may appeal to the President.

(a) The Director of Selective Service * * * may appeal to the President from any determination of an appeal board at any time prior to the induction of the registrant.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions.

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisities of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or aganist members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of

the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

In The United States District Court
For The District Of Maryland

Civil Action No. 71-60-N

Howard Mark Sandler

v.

Curtis W. Tarr, National Director of Selective Service, et al.

(Filed: July 27, 1971)

NORTHROP, Chief Judge:

Plaintiff brought this action for injunctive and other relief to restrain and enjoin defendants from inducting him into the Armed Forces of the United States. On January 22, 1971, this court issued a temporary restraining order; by stipulation of the parties and order subsequently entered on February 1, 1971, the temporary restraining order was extended to remain in force until the case could be heard on its merits. A hearing was held on April 8, 1971, on defendants' motion to dismiss the complaint; on April 14, 1971, this court entered an order staying decision on defendants' motion to dismiss pending final disposition of *Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971), by the Supreme Court of the United States. On June 14, 1971, the Supreme Court denied certiorari. 39 U.S.L.W. 3549 (U.S. June 14, 1971).

From September, 1963 until June, 1967, plaintiff was enrolled at the Johns Hopkins University, Baltimore, Maryland, as a full-time undergraduate student. During

this period, plaintiff was granted an undergraduate student deferment — II-S. Upon graduation in early June, 1967, plaintiff was enrolled as a full-time graduate student at Northwestern University in Illinois. From September, 1967 until November, 1968, he held a II-S deferment under Section 6(h)(2) of the Selective Service Act (graduate student deferment).

On November 7, 1968, plaintiff's local draft board mailed him a Notice of Classification advising him that he had been reclassified from II-S to I-A. At a subsequent personal appearance before the local board, plaintiff requested a I-S(c) deferment for the purpose of completing the academic year of graduate studies. The Board denied this request and classified plaintiff I-A. After a timely notice of appeal, the Appeal Board classified plaintiff I-A. On January 27, 1970, plaintiff's local board again mailed plaintiff a Notice of Classification informing him of the Appeal Board's decision and of his I-A classification.

Plaintiff was married on June 17, 1969, and it is undisputed that at all times since he has maintained a bona fide family relationship and his wife has resided with him continuously. In December, 1969, while his appeal was pending from his local board's denial of his I-S(c) deferment request, plaintiff learned that his wife was pregnant. Plaintiff notified his local board of this fact and requested that his case be reopened and that he be reclassified in class III-A (fatherhood deferment). Apparently the local board did not reopen plaintiff's file — plaintiff alleges that the board ignored his letter and request.

On March 2, 1970, plaintiff's local draft board mailed to plaintiff an Order to Report for Induction. After plaintiff protested, the State Director of Selective Service, on March 4, 1970, postponed plaintiff's induction until June, 1970. Plaintiff again requested reclassification as I-S(c). This was denied by the State Director on March 25, 1970, and on March 27, 1970, his local board advised plaintiff that he would be scheduled for induction in June, 1970. Plaintiff protested and requested a III-A classification.

On May 13, 1970, the local board canceled the scheduled induction.

On May 5, 1970, a daughter was born to the plaintiff and his wife and at all times since plaintiff has maintained a bona fide family relationship with his child in his home. Plaintiff notified his local board of this event.

On June 16, 1970, the local board again mailed to plaintiff a Notice of Classification advising him that he had been reclassified I-A. Following a personal appearance before the local board, that board concluded that plaintiff was not entitled to a III-A deferment because plaintiff had received a II-S deferment after June 30, 1967.

On September 17, 1970, the local board again mailed to plaintiff a Notice of Classification notifying plaintiff that the board had refused to classify him III-A. This decision was upheld on appeal to the Appeal Board. Plaintiff again received a Notice of Classification (I-A) on December 1, 1970. On December 2, 1970, the board mailed to plaintiff an Order to Report for Induction at Nashville, Tennessee, on January 28, 1971. This action was then instituted.

The defendants have filed a motion to dismiss the action (1) on the ground that the court lacks jurisdiction by virtue of section 10(b)(3) of the Selective Service Act, 50 App. U.S.C. § 460(b)(3) and (2) on the ground that the complaint fails to state a claim upon which relief can be granted.

Section 10(b)(3) of the 1967 Selective Service Act, 50 App. U.S.C. § 460(b)(3) provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . .

While a literal reading of this statute would bar all pre-induction judicial review of a registrant's Selective Service classification, the Supreme Court has carved out a limited

exception in *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) and *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970). In *Oestereich v. Selective Service System, supra*, plaintiff had a IV-D (ministerial student) exemption. He turned in his draft card in opposition to the Viet-Nam war. His local board declared him delinquent and reclassified him I-A. The district court dismissed his complaint and the tenth circuit affirmed, holding that section 10(b)(3) of the Military Selective Service Act precluded pre-induction judicial review. The Supreme Court reversed, holding that the local board was not empowered to punitively reclassify a registrant who was clearly entitled to a statutory exemption. Finding that the conduct of the local board was "basically lawless," the court stated: "In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate."

In *Breen v. Selective Service Local Board, supra*, plaintiff held a II-S deferment as a student in a Boston School of Music. He surrendered his draft card in protest of the Viet-Nam war and his local board reclassified him I-A as being delinquent. Both the district court and court of appeals dismissed under section 10(b)(3). The Supreme Court reversed on the authority of *Oestereich*. The government did not contest plaintiff's factual allegations concerning his student status. The Court refused to recognize any distinction between exemptions (as in *Oestereich*) and deferments. The Court pointed out that the case before them, like *Oestereich*, involved a "clear departure by the Board from its statutory mandate."

Whether this court has jurisdiction to entertain this action will depend upon whether the defendants acted lawfully in denying plaintiff a III-A fatherhood deferment. The merits of the controversy are closely related to the jurisdictional issue, and the court always has jurisdiction to determine jurisdiction. *See Gregory v. Tarr*, 436 F.2d

513, 515-16 (6th Cir. 1971); *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969); *Pasquier v. Tarr*, 318 F. Supp. 1350, 1360 (E.D. La. 1970).

The Selective Service Act of 1967 provides for two classes of student deferments. Section 456(h)(1)[1] provides for the undergraduate student deferment while section 456(h)(2) provides for graduate student deferments.[2] It is important to note at this point that the language of the two sections differs markedly. The Act provides that "the President *shall*" provide for the deferment of pre-baccalaureate students, while it states that "the President is *authorized*" to provide for graduate student deferments. (Emphasis supplied.) Undergraduate student deferments, then, are mandatory; graduate student deferments only directory. This distinction becomes important for the proper resolution of this case.

50 App. U.S.C. §456(h)(1), as has already been indicated, provides for the deferment of undergraduate students who are satisfactorily pursuing a full-time course of college study. The grant of such a deferment, however, involves the waiver by the recipient of other deferments:

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[1] 50 App. U.S.C. § 456(h)(1):

Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the defendant from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. . . .

[2] 50 App. U.S.C. § 456(h)(2):

Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons . . . whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest. . . .

> No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree . . . .

Section 456(h)(2), which provides for graduate student deferments, also makes provision for the so-called "fatherhood," or III-A deferment:

> Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes.

It is this deferment to which plaintiff contends he is entitled. He has been denied a III-A fatherhood deferment pursuant to Selective Service Regulation 1622.30, 32 C.F.R. §1622.30(a):

> In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian . . . except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.[3]

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[3] This regulation has now been superseded by the following regulation, revised as of January 1, 1971:

> In Class III-A shall be placed any registrant who prior to the effective date of this paragraph in its present form submitted to his local board information establishing his eligibility for deferment on the grounds of fatherhood under regulations in effect prior to such date, or who is so classified prior to such date, and who continues to maintain a bona fide family relationship in their home with his child or children, except that this paragraph shall not apply to any registrant who subsequently becomes a physician, dentist, or veterinarian.

This regulation, as interpreted by the Selective Service System, denies a III-A fatherhood deferment to anyone who has received a II-S student deferment under the 1967 Act. The claim is made that this regulation, as so interpreted, is in conflict with the statute, and that therefore the action of defendants in denying plaintiff a III-A deferment is "blatantly lawless." The argument goes as follows. Section 456(h)(1) states that anyone who has received a deferment under this *paragraph* cannot receive a deferment under this *subsection*. The deferment referred to is the undergraduate student deferment provided for in paragraph (1) of subsection (h) of section 456, title 50, United States Code App. The receipt of this deferment means, then, that the recipient cannot receive, among others, a III-A fatherhood deferment under paragraph (2) of subsection (h), for the statute clearly states that one who has received a II-S deferment under paragraph (1) may not receive any of the other deferments in that subsection. It is clear that the statute does not prohibit a III-A fatherhood deferment to one who has received a II-S graduate student deferment under the 1967 Act. Provision for graduate II-S deferments is made in section 456 (h)(2) of the Act; that is, paragraph (2) of subsection (h). Thus, the statutory denial of deferments contained in subsection (h) is only applicable where the claimant has received an undergraduate II-S deferment under the 1967 Act. This is actually so apparent from a reading of the statute that it would hardly seem to merit any extended discussion, because to accord the statute a contrary interpretation would fail to give meaning to the different terms "paragraph" and "subsection." There can be no doubt that Congress understood the difference in the meaning of the two terms. However, analogous issue has been the source of extensive judicial exposition, and will be adverted to here to demonstrate the propriety of the above statutory construction.

Section 456(h)(1) denies the deferment granted by subsection (i) (§456(i)) to anyone who has previously received a II-S deferment "under the provisions of this paragraph" of the 1967 Act. Subsection (i)(2) grants a

I-S student deferment until the end of the current academic year, or until the registrant ceases to satisfactorily pursue his college program, to a student who is ordered to report for induction.[4] There is a Selective Service Regulation[5] which states that a student who has received a student deferment is not eligible to receive a I-S deferment. This regulation had been interpreted by the Selective Service System to deny the I-S deferment to any registrant who had received an undergraduate or graduate student deferment under the 1967 Act. When faced with this apparent conflict between the regulation and the statute, the courts, with only a few exceptions, have ruled that the regulation is invalid. *See e.g., Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969); *Marsano v. Laird*, 412 F.2d 65 (2d Cir. 1969); *Crane v. Hershey*, 410 F.2d 966 (1st Cir. 1969); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969); *Lerner v. Hershey*, 312 F. Supp. 99 (N.D. Ga. 1970); *Keller v. Hershey*, 309 F. Supp. 687 (S.D. Fla. 1969); *Weppler v. Hershey*, 308 F. Supp. 447 (N.D. Ill. 1969); *Kaplysh v. Allen*, 303 F. Supp. 1007 (N.D. Ohio 1969); *Carey v. Local Board No. 2*, 297 F. Supp. 252 (D. Conn. 1969), *aff'd* 412 F.2d 71 (2d Cir. 1969). *But see Rich v. Hershey*, 408 F.2d 944 (10th Cir. 1969).

While these I-S cases support plaintiff's position that section 456(h)(1) does not prohibit him from receiving a III-A fatherhood deferment under section 456(h)(2), they do not control on the issue of the validity of Selective Service Regulation 1622.30(a). The III-A fatherhood and the I-S student deferments differ in one fundamental respect — the I-S deferment is mandatory while the III-A deferment is only directory. This difference is basic to the resolution of this case, and leads to the conclusion

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[4] 50 App. U.S.C. § 456(i)(2):

Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the facts being presented to the local board, be deferred (A) until the end of such academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier . . .

[5] Selective Service Regulation 1622.15(b), 32 C.F.R. § 1622.15(b).

that Selective Service Regulation 1622.30 is valid and that plaintiff is not entitled to relief.

In *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1969), the court held, in a class action suit, that Regulation 1622.30(a) was invalid because it conflicted with the Act. On appeal, the United States Court of Appeals for the Sixth Circuit reversed. *Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971). Prior to the Sixth Circuit decision in *Gregory*, two other district courts were faced with the same issue. In *Whitmore v. Tarr*, 318 F. Supp. 1279 (D. Neb. 1970), the court granted relief to plaintiff who was admittedly a member of the class granted relief by the district court in *Gregory*. The court reached this result because it felt itself bound by the judgment of the district court in *Gregory*. In the course of its opinion, however, the court indicated that if it were free to decide the issue of the conflict between the statute and the regulation, it would reach a different conclusion than that reached in *Gregory*. 318 F. Supp. at 1283. It should also be pointed out that on appeal, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court. *Whitmore v. Tarr*, ... F.2d .... (8th Cir. Feb. 24, 1971).

In a case decided eight days before the district court decision in *Whitmore*, the United States District Court for the Eastern District of Louisiana refused to follow the district court decision in *Gregory*, holding that Selective Service Regulation 1622.30 does not conflict with the express terms of the Act and that it is valid. *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970).[6] The rationale of the court was as follows:

> We are in complete agreement with the *Gregory* case that the proviso in 6(h)(1) prohibits the granting of III-A deferments only to persons who have received undergraduate student deferments since June 30, 1967. We therefore hold that the plaintiff is correct in his argument that he is not prohibited by the

[6] The court in *Pasquier* held that it was not bound by the holding in *Gregory* because no notice was given to the absent members of the class in that case.

relevant language in 6(h)(1) from receiving a III-A classification. But does this automatically render Selective Service Regulation 1622.30(a) invalid? We think not. The fact that 6(h)(1) does not *prohibit* the plaintiff from receiving a III-A classification does not mean that it *compels* the granting of such a deferment. It is on this point that the legal paths leading to the solutions of the I-S and III-A issues cease to run parallel to each other and begin to diverge. For a chief difference between the two deferments is that the I-S deferment is mandatory, while the III-A classification is only directory . . . . But the granting of a III-A deferment is made discretionary rather than mandatory by Section 6(h)(2), which says that the President is not compelled, but "authorized, under such rules and regulations as he may prescribe, to provide for" the granting of III-A deferments. Thus, by saying that the President "is authorized" to provide for the granting of III-A fatherhood deferments rather than stating that such classifications "shall" be granted, the statute specifically allows the Selective Service System to limit the granting of III-A fatherhood deferments by appropriate regulation. For this reason, it cannot be said that Selective Service Regulation 1622.30(a) conflicts with the express terms of the Selective Act, although this may well be true in the case of the regulation applicable to I-S deferments . . . . 318 F. Supp. at 1357-58.

The sixth circuit decision in *Gregory*, is in accord with *Pasquier*. The court in *Gregory* reasoned that:

Thus, both the graduate student deferment and the fatherhood deferment are matters of executive grace which can be made subject to any reasonable conditions, rather than matters of statutory right. The Executive has exercised its discretion to provide for both graduate deferments and fatherhood deferments, but has pre-conditioned the latter deferment on not having requested and received a graduate student deferment so as to preclude the "pyramiding" of defer-

ments into complete exemption from military service. 436 F.2d at 517-18.

This court is in complete accord with the sixth circuit decision in *Gregory* and the district court decision in *Pasquier*. Section 456(h)(2) says that the President is "authorized, under such rules and regulations as he may prescribe, to provide for" the granting of III-A deferments. Section 456(i)(2), on the other hand, says that any person who is satisfactorily pursuing a full-time college program at the time he is ordered to report for induction "*shall*, upon the facts being presented to the local board, be deferred" with a I-S classification. (Emphasis added). *See Marsano v. Laird, supra*, at 68. Thus, the statute allows the President to limit the granting of III-A fatherhood deferments by reasonable regulations while it does not allow such limitation of the I-S deferment. It cannot be said that the Selective Service System, in enacting Regulation 1622.30(a), has acted in a blatantly lawless manner. Therefore, the court holds that 50 App. U.S.C. §460(b)(3) prevents this court from exercising jurisdiction in this case. Defendants' motion to dismiss is hereby granted.

EDWARD S. NORTHROP,

Chief United States District Judge.

MEMORANDUM AND ORDER

(Filed November 3, 1971)

Plaintiff Sandler has moved this court to alter or amend its judgment rendered July 27, 1971, dismissing his complaint. The judgment of dismissal followed a determination that jurisdiction was lacking in light of Section 10(b)(3) of the Selective Service Act which bars pre-induction judicial review of classification by a local board unless, under the *Oestereich* and *Breen* decisions of the Supreme Court, discussed *infra*, the local board has acted in a "basically lawless" manner. This court determined that the

III-A fatherhood deferment sought by the plaintiff is made directory, not mandatory, by the Act. Therefore, Selective Service Regulation 1622.30 is valid as an exercise of executive discretion. Since plaintiff's local board acted pursuant to that regulation, it acted lawfully and this court had no jurisdiction to entertain plaintiff's complaint. See this court's opinion, *Sandler v. Tarr*, Civil No. 71-60 N (July 27, 1971).

Plaintiff's present motion to amend is not based on a claim that the local board's failure to grant a III-A deferment in accordance with a *statutory* mandate was "basically lawless." Rather, plaintiff now claims that Local Board No. 34 was basically lawless in its failure to honor a *judicial* mandate, namely, the order issued by the United States District Court for the Eastern District of Michigan in the case of *Gregory v. Hershey*, 311 F.Supp. 1 (1969). In other words, plaintiff claims that the Michigan order had nationwide effect. As authority for this proposition plaintiff cites cases which hold that persons subject to an injunction are not free to disregard that injunction until it has been dissolved by orderly review. This court does not take issue with those cases. However, plaintiff's proposition is far removed from the authority he cites. He would have this court extend the law to include individuals outside the jurisdiction of the court issuing the order, where those individuals were absent from the litigation and were not made parties defendant.

Plaintiff relies on the case of *Howat v. Kansas*, 258 U. S. 181 (1922), and its progeny, to support his argument. The language of that opinion, however, would indicate otherwise:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, *and served upon persons made parties therein and within the jurisdiction, must be obeyed by them* however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. *Id.*, at 189-90 (emphasis supplied).

The requirements of being present and a named party are not incidental to the language or impact of the *Howat* case. To delete those requirements from the rule of law announced would drastically alter the effect of its holding. It would, for example, permit a single federal district judge to issue an order having nationwide effect on federal legislation, a result that would be disastrous. Federal statutory schemes would be subjected to continued chaos. The Michigan court rendered a decision based on its own interpretation of the Selective Service Act and pertinent regulations. This court does not feel bound by that interpretation.

The fact that the Michigan case involved a class action should not change the result. The overwhelming majority of case law and commentary on Rule 23, Federal Rules of Civil Procedure, concentrates exclusively on problems surrounding the composition of the plaintiff class. This court's research has uncovered no authoritative discussion of the composition of a defendant class. In particular, there is no guidance regarding res judicata of class action judgments on absent, non-party defendants. The Sixth Circuit was equally doubtful in its opinion reversing *Gregory v. Hershey, supra, sub nom Gregory v. Tarr,* 436 F.2d 513 (6th Cir. 1971), where it observed:

> Defendants have not questioned the validity of the class action although no notice to the members of the class was given as provided by Rule 23, Fed.R.Civ.P., nor have they questioned the jurisdiction of the court over the State Directors of Selective Service, the Local Boards and their members for the states of Indiana, Illinois, and Minnesota.
>
> Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System. *Id.*, at 514, n.2.

In the private sector, the result plaintiff urges on this court would not be so troublesome. However, in the public sector where governmental agencies and statutory schemes might be disrupted, the judiciary must be more cautious. Deference must be paid to legislative intent attendant to the statute being construed. Section 10(b)(3) of the Act makes quite clear the intent of Congress that individual registrants should not be permitted to disrupt the operation of the Selective Service System via judicial challenge. Attacks on classification and processing have been expressly limited to defenses in criminal prosecutions. This is far removed from class actions seeking declaratory and injunctive relief.[1] When Congress authored § 10(b)(3), it could not have envisioned the Supreme Court holdings[2] which were forthcoming to carve a very narrow exception to the prohibition to pre-induction judicial review. Nor would the Congress, presumably, sanction the punitive reclassifications which occasioned the Supreme Court's holdings. However, there is no indication either from the Supreme Court or from Congress that the basic posture of § 10(b)(3) should be altered.

When the Supreme Court in *Oestereich* and *Breen* carved out the "basically lawless" exception to the judicial review prohibition of § 10(b)(3), it was dealing with instances of punitive reclassification. Pre-induction review was thought to be appropriate where a local board had clearly departed from its statutory mandate. The refusal of Maryland Local Board No. 34 to accede to a court order issued in Michigan is not a departure from statutory mandate, especially where the efficacy, within Maryland, of the Michigan court order was and is in doubt. It is im-

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[1] Although the Michigan order in *Gregory v. Hershey* was not an injunction, it certainly had injunctive effect. The court ordered the defendants to award III-A fatherhood deferments to all members of the plaintiff class. In effect, this order enjoined the defendants from enforcing Selective Service Regulation 1622.30, 32 C.F.R. §1622.30 (a).

[2] *Oestereich v. Selective Service System Local Board No. 11*, 303 U.S. 233 (1968) and *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970).

portant to note at this point that in effect Local Board No. 34 did comply with the Michigan order since it withdrew plaintiff's induction order, thus deferring him from the draft temporarily.

While the national director of Selective Service may have been a party to the Michigan action, the Maryland Board was not. The former is not empowered to grant a III-A deferment to plaintiff in Maryland; the latter, in its discretion, is so empowered. This court cannot say that Maryland Local Board No. 34 was clearly bound by the Michigan decision. Therefore, it cannot have clearly departed from its statutory mandate and its action in refusing plaintiff's request for deferment was not "baically lawless." Thus this Court continues to be without jurisdiction to hear plaintiff's complaint and his motion to amend must be denied.

Even if the local board could be deemed to have acted in a basically lawless manner, plaintiff would succeed only in securing pre-induction judicial review of his classification. Were review justified, this Court could only find that plaintiff is not now entitled to a III-A fatherhood deferment. See *Gregory v. Tarr, supra, cert. denied* 403 U.S. 922 (1971); *Whitmore v. Tarr*, — F.2d — (8th Cir. 1971); and *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970). This motion would therefore seem to be an exercise in futility, for at best, plaintiff could only get into court long enough to have his case dismissed on the merits.

Furthermore, there remains a problem of the relief to which plaintiff might conceivably be entitled. Plaintiff was not inducted into military service during the life of the *Gregory v. Hershey* district court order. The question has now been rendered moot by the reversal of that decision and the denial of certiorari, *supra*. It is too late to doubt that this court has no jurisdiction to entertain moot questions. This court can see no grounds upon which a present claim for III-A deferment can be based. The deferment arguably may have been justified in the past, but it undoubtedly is not justified now. This court is not prepared to award, or reward, plaintiff with a III-A fatherhood

deferment simply because his draft board may have blundered in the past, especially in light of the fact that the alleged blunder did not prejudice plaintiff who remained a civilian throughout the term of the Michigan order as well as these proceedings.

Plaintiff claims in this motion that he has been prejudiced by the Local Board's failure to reclassify him III-A because had the board done so as ordered by the Michigan court, the board would have reclassified him I-A *after* the Sixth Circuit reversed that order, and plaintiff would then have been entitled to challenge the reclassification anew as well as appeal the denial which was sure to follow. This, plaintiff argues, would have purchased additional time during which he could not be inducted into the service. While this court does not doubt the prejudice claimed, it does doubt the legal metaphysics upon which the claim is based. When the Sixth Circuit reversed the Eastern District of Michigan order of *Gregory v. Hershey*, the circuit court ruled that the district court had no jurisdiction to entertain the complaint. The circuit court remanded the case to the district court with orders to dismiss the complaint. This, of course, would dissolve the order that had been issued by the district court. But it also says that the district court never had jurisdiction of the case. An order issued without jurisdiction is null and void — it never existed. It is one thing to say that such an order must be obeyed before it is dissolved. It is quite another thing to say that relief may now be based on the fact that the order had existed at an earlier time. This, in effect, is what plaintiff now requests when he asks that his classification be changed from its present I-A to the III-A deferment to which plaintiff is not entitled, so that the Local Board will be required to again reclassify plaintiff I-A at which time plaintiff can again commence the challenge and appeal machinery. This is nonsense. For such retrospective purposes, the Michigan court order never existed, and cannot now serve as the basis for such gymnastics.

For all of the above reasons, it is this 3rd day of November, 1971, by the United States District Court for the District of Maryland, ORDERED:

That plaintiff's motion to amend the judgment of this court be, and the same hereby is, denied.

EDWARD S. NORTHROP,
Chief United States District Judge.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-2158

Howard Mark Sandler,

Appellant,

versus

Curtis W. Tarr, National Director of Selective Service, and Colonel James L. Hays, III, State Director Selective Service System, and Local Board No. 34, Reisterstown, and James D. Lauderman, Jr., Member of Local Board No. 34, Reisterstown, and Herbert Brown, Member of Local Board No. 34, Reisterstown, and Edward A. Halle, Member of Local Board No. 34, Pikesville, and William F. Mosner, Member of Local Board No. 34, Reisterstown, and Local Board No. 21, Nashville, Tennessee,

Appellees.

Appeal from the United States District Court for the District of Maryland at Baltimore. Edward S. Northrop, Chief Judge.

(Argued April 14, 1972 Decided May 25, 1972)

Before Haynsworth, Chief Judge, Boreman, Senior Circuit Judge, and Russell, Circuit Judge.

H. Thomas Howell (Semmes, Bowen and Semmes on brief) for Appellant, and Robert E. Kopp, Attorney,

Department of Justice, (L. Patrick Gray, III, Assistant Attorney General, Morton Hollander, Attorney, Department of Justice, and George Beall, United States Attorney, on brief) for Appellees.

PER CURIAM

This is an appeal from a denial of pre-induction relief by a registrant, who was refused by his Selective Service Board a Class III-A fatherhood classification pursuant to the terms of the exception incorporated in Selective Service Regulation 1622.30(a), 32 C.F.R., sec. 1622.30(a).[1] While the registrant challenges the validity of the regulation, his primary claim is that, as a member of the class embraced in the action styled *Gregory v. Hershey* (D.C. Mich. 1969) 311 F. Supp. I, and entitled to the benefit of the injunction granted by the District Court in that case, he should have been reclassified in Class III-A by his Selective Service Board in accordance with the judgment entered by the District Court in that case and his induction orders cancelled, even though the injunction granted in that case was dissolved on appeal and the action itself was dismissed on jurisdictional grounds. (436 F.2d 513). The District Court, in two well-reasoned opinions found the regulation valid and the claim based on the injunction granted in *Gregory* without merit, holding as did the Court in *Pasquier v. Tarr* (5th Cir. 1971) 444 F.2d 116, 117, that the judgment and injunction granted by the District Court in *Gregory* "col-

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[1] Sec. 1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

(a) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: *Provided*, That a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

lapsed, both for the parties and the members of the class, following its reversal by the United States Court of Appeals for the Sixth Circuit in *Gregory v. Tarr*, 6 Cir., 1971, 436 F.2d 513."

We affirm on the opinions of the District Court.

Affirmed.

ORDER

(Filed July 5, 1972)

Upon consideration of appellant's petition for rehearing and of the suggestion for a rehearing en banc,

IT IS ORDERED, with the concurrence and approval of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b), that the petition be and it is hereby denied.

United States Circuit Judge.

ORDER

(Filed July 10, 1972)

Upon motion of the appellant, by his counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court as prescribed by law within ninety (90) days or on or before August 23, 1972.

For the Court — by Direction.

/s/ SAMUEL W. PHILLIPS,

Clerk.

APPENDIX C

OPINIONS IN COMPANION CASE

This case is a companion sequel to *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1969) and 51 F.R.D. 188 (E.D. Mich. 1970), reversed sub. nom. *Gregory v. Tarr*, 436 F.2d 513 (6th Cir.), cert. denied 403 U.S. 922 (1971). Because repeated reference to the *Gregory* litigation is necessary to ascertain the grounds of the judgment below, the pertinent opinions and judgment in *Gregory* are set forth below in compliance with Rule 23(i) of the Rules of this Court.

Stephen L. Gregory et al., Plaintiffs,

v.

Lewis B. Hershey et al., Defendants.

Civ. A. No. 33057

United States District Court,

E. D. Michigan, S. D.

Dec. 23, 1969

OPINION OF THE DISTRICT COURT

Talbot Smith, District Judge

This case comes before us on a complaint for declaratory judgment, and other relief, arising under the Selective Service Act of 1967, Pub. L. 90-40, June 30, 1967 (81 Stat. 100, 50 U.S.C. App. §§451-471), hereinafter termed "the Act." We are now ruling upon a Motion for Summary Judgment (Rule 56(a), Rules of Civil Procedure.)

The named plaintiffs bring the action in their own behalf of a class (Rule 23, Federal Rules of Civil Procedure), namely, Selective Service registrants who are fathers and who have received a deferment since June 30, 1967 as post-

baccalaureate students pursuing a full-time course of instruction at a college, university, or similar institution of learning, under Section 6(h)(2) of the Act (this deferment being a "graduate II-S"). These plaintiffs have not, however, received pre-baccalaureate deferments ("undergraduate II-S's") since June 30, 1967. They have all been denied fatherhood III-A deferments by the Selective Service System.[1] They assert that they are entitled to such deferment under the Act and Regulation as a matter of right, and that the denial of such deferment is an illegal action by the Selective Service System founded upon an erroneous interpretation of the law. They have exhausted their administrative remedies, and have received orders to report for induction.

The plaintiffs before us in person are generally in like positions with respect to the draft and to their education. They are graduate students. They are well along in preparation for their chosen professional careers. They are married (and, with one exception, prior to the effective date of the Act), are fathers, and have incurred the substantial financial obligations that are today's usual concomitant of advanced educational and professional training. In addition, there are significant health problems with respect to the families of some, but not all, of the plaintiffs, although not of such magnitude, in defendants' judgment, as to warrant the grant to the involved plaintiffs of hardship III-A deferments under Regulation 1622.30(b).

We turn at once to the Regulation in question, 1622.30(a). It provides in pertinent part as follows:

> 1622.30 "(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section

[1] See, Act § 6(h)(2); Regulation 1022.30(a).

1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

Similarly, Section 6(h)(1) of the Act provides in part as follows:

> "No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), * * *"

Subsection 6(h)(2) of the Act provides in part as follows:

> "Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

The question before us concerns the proper meaning and interpretation of the quoted portions of the Act and the Regulations. This, in turn, requires an examination of the statutory scheme of the Act. In Carey v. Local Board, D.C. 297 F. Supp. 252, aff'd 2 Cir., 412 F.2d 71, the Act was analyzed in the following terms:

> "Section 6(h)(1) of the Act, 50 App. U.S.C. §456 (h)(1), directs that the President shall provide for the granting of deferments to students who are satisfactorily pursuing a full time course of instruction in a college at the undergraduate level. This statutory undergraduate deferment continues until the student

receives a baccalaureate degree or reaches age twenty-four, which ever occurs earliest. This subsection has no predecessor in the earlier selective service acts. It was enacted in 1967 and became effective on June 30, 1967. Pursuant to 32 C.F.R. §1622.25, students in this category are classified as II-S (undergraduate II-S deferment.)

"Another category of deferments is provided for in §6(h)(2) of the Act. This section includes an authorization for the President to provide by regulation for the deferment of graduate students whose deferment he considers essential to the national interest. This section was also enacted with the 1967 amendments, but an almost identical provision was present in the 1948 and 1951 Acts. Section 6(h) of those earlier Acts authorized the President to provide for the deferment of both graduate and undergraduate students, there having been no equivalent in those Acts to the mandatory deferment of undergraduates now found in the current §6(h)(1). Graduate students deferred under the President's rule-making power are also classified as II-S under 32 C.F.R. §1622.26 (graduate II-S deferments.)

"There is a third category of student deferment which applies to all university students, whether graduates or undergraduates. Under 32 C.F.R §1622.15(b) this type of deferment is designated as I-S. Its source is §6(i)(2) of the Act which has remained unchanged since 1951. * * *"

It is clear from the files and affidavits appended to the pleadings herein that plaintiffs have been denied fatherhood III-A deferments because of the defendants' belief that the Act prohibits the granting of such deferments to registrants who have received a graduate II-S deferment since June 30, 1967, relying upon Section 6(h) of the Act and Regulation 1622.30(a)

Such construction of both the Act and the Regulation is demonstrably erroneous. In the alternative, if only the

Regulation is properly so construed, it is based upon an erroneous interpretation of the Act and unauthorized thereby. For the intent of the statute is clear. "No person," it reads in the quoted 6(h)(1) "who has received a student deferment under the provisions of this paragraph" (*this* paragraph being paragraph 1, the paragraph concerning the pre-baccalaureate, undergraduate II-S deferment) "shall thereafter be granted a deferment under this subsection" (subsection (h), authorizing fatherhood III-A deferments). But the crunch here is that these plaintiffs before us have never had a pre-baccalaureate, undergraduate II-S deferment under the Act. Hence they are not precluded from the fatherhood III-A by the express terms of the Act, and any construction or interpretation contrary thereto is obviously unlawful, as is any Regulation grounded upon such misconstruction. So far as the discretion of the Executive may be argued to support defendants' interpretation, such discretion is not boundless. Thus the Executive could not, in his discretion, provide for the deferment of Michigan fathers but not Indiana fathers. It must, to be lawfully exercised, not conflict with the express provisions of the Act.

A similar question has been presented in the so-called I-S cases. Those cases involved the availability of the I-S deferment under Section 6(i)(2) of the Act for those students who (as the plaintiffs in the case before us) had received a graduate (but not an undergraduate) II-S deferment since the effective date of the Act, June 30, 1967. Regulation 1622.15(b) denies the right to a I-S deferment to a student who has previously received a II-S deferment, just as Regulation 1622.30(a) in the case before us denies a fatherhood III-A to registrants who have received a II-S. But upon a critical examination of the Act it has been clear to a number of courts, Ellis v. Hershey, 302 F. Supp. 347 (E.D. Mich. April 30, 1969); Bowen v. Hershey, 410 F.2d 962 (1st Cir. 1969); Carey v. Local Bd. No. 2, D.C. 297 F. Supp. 252, aff'd 412 F.2d 71 (C.A. 2, 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); Marsano v. Laird, 412 F.2d 65 (C.A. 2, 1969); that the Act forbade the granting of a I-S only to those students who

had received an undergraduate II-S under Section 6(h)(1) of the Act, but not to those who had received a graduate II-S under the provisions of 6(h)(2) of the Act.

We are cited to portions of the legislative history tendered in explanation of the scheme of the statute, but we do not view the Act as involving the kind of ambiguity that warrants an examination of the legislative history for our guidance.

The defendants challenge our jurisdiction, arguing that Section 10(b)(3) of the Act bars pre-induction review. Defendants' obstacle, of course, is Oestereich v. Selective Service System Board No. 11, 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968). But defendants seeks to distinguish *Oestereich*. They rely primarily upon the concession by the Government found in that case. Thus, in this regard, the defendants argue

> "In his brief before the Supreme Court, the Solicitor General conceded that Oestereich was a full-time divinity student and recognized that he was therefore entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. The Supreme Court agreed and held that Section 10(b)(3) would not bar pre-induction judicial review in that case. The Court accepted the Solicitor General's assurance that *Oestereich* was entitled to the divinity student exemption and agreed that there was no statutory authorization for his reclassification pursuant to regulations which were triggered by 'activities or conduct not material to the grant or withdrawal of the exemption' (*i.e.* Oestereich's status as a divinity student) 393 U.S. at 237, 89 S. Ct. 414. The Court therefore concluded that to compel one who was clearly *exempt* from military service to submit to such service (or to face criminal prosecution) in order to establish his 'plain and unequivocal' and *uncontested* right to such an exemption would be unduly harsh, 393 U.S. at 238, 89 S. Ct. 414, and held Section 10(b)(3) to be inapplicable." (Page 4, Defendants' Brief. All emphasis in original.)

We attach no significance to the concession by the Government in that case. Gracious it may have been, but the resolution of this kind of question does not turn upon Government's grace. Nor, as we read the case, did the Supreme Court rely upon any confession of error by the Government. Rather the thrust of its opinion was that the "conduct of [the] Local Board [was] basically lawless." 393 U.S. at 237, 89 S. Ct. at 416. Moreover, here, as in *Oestereich*, "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." *Id.* at 238, 89 S. Ct. at 416.

The defendants stress also that *Oestereich* involved a case of a statutorily granted exemption. But whether lawless action by a Local Board involves an exemption or a deferment, the action remains lawless. Neither dictionary definitions nor semantic subtleties control basic statutory rights. It is clear from the I-S cases heretofore cited that the denial of the statutory right to II-S deferment under Section 6(i)(2) of the Act likewise call for judicial review. We are aware, we note in passing, of Anderson v. Hershey, 410 F.2d 492 (C.A. 6, 1969), which limits the holding of the invalidity of the delinquency regulations in *Oestereich* to those situations in which the delinquency regulations apply to statutory exemptions.

In summary, as to jurisdiction, this matter concerns, not a deferment resting in the discretion of a Local Board or Selective Service official, but a deferment mandated by regulation; there is no factual question (or mixed question of fact and law) presented to the Court for decision, but a question of law only. Such legal question is, as well, applicable to an entire class of registrants, not simply to one particular individual. A civil action, moreover, in this Court, is the only feasible opportunity which this class of registrants has to present before a competent forum their legal arguments to obtain a determination, for the entire class, of the validity of their sought induction under these circumstances.

Upon a consideration of these factors it is our conclusion under the teachings of *Oesterich* that we have juris-

diction, that the cause of action shall be maintained as a class action, Rule 23, Rules of Civil Procedure, and that Regulation 1622.30(a), interpreted by defendants as hereinabove described, is illegal because founded on an erroneous interpretation of the Act and unauthorized thereby.

Suitable orders may be presented.

Stephen L. Gregory et al., Plaintiffs,

v.

Lewis B. Hershey et al., Defendants.

Civ. A. No. 33057

United States District Court,

E. D. Michigan, S. D.

Feb. 27, 1970

Talbot Smith, District Judge

ORDER DETERMINING THE VALIDITY OF CLASS ACTION

Upon motion of plaintiffs' attorneys and it appearing to the Court that:

1. The above cause of action was brought as a class action pursuant to Rule 23 of the Rules of Civil Procedure;

2. The prerequisites to a class action as set forth in Rule 23(a) of the Rules of Civil Procedure have been satisfied, in that the class being represented is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately represent the interest of the class;

3. The prosecution of separate actions, by individual members of the class would create a risk of inconsistent or varying adjudications, which Rule 23(b)(1) of the Rules of Civil Procedure seeks to avoid, with respect to individual members of the class, would establish incompatible standards of conduct for the defendants, and such incompatible standards make declaratory relief with respect to the class as a whole appropriate;

4. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final relief in the nature of mandamus and corresponding declaratory relief with respect to the class as a whole, as contemplated by Rule 23(b)(2) of the Rules of Civil Procedure; and that

5. Notification of members of the calss is impractical because of the number of members and the absence of any reasonable way of identifying them; therefore

It Is Hereby Ordered, that the above cause of action shall be allowed to be maintained as a class action. The class is hereby determined to consist of all Selective Service registrants who have a child or children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category as defined by Selective Service Regulations 1622.30(a) (32 C.F.R. §1622.30(a)), and who have not received an undergraduate II-S deferment under Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. §456(h)(1)), but who have received a graduate II-S deferment under Section 6(h)(2) of said Act.

JUDGMENT AND ORDER IN THE NATURE OF MANDAMUS

Upon motion of plaintiffs' attorneys for summary judgment pursuant to Rule 55 of the Rules of Civil Procedure and it appearing to the court that:

1) This action is validly brought as a class action, the class being defined as all Selective Service registrants who:

(a) have a child or children with whom they maintain a bona fide family relationship in their homes, and

(b) are not physicians, dentists, or veterinarians or in an allied specialist category, and

(c) have not received an undergraduate II-S deferment under the Military Selective Service Act of 1967 (50 U.S.C. App. §§451-73) [hereinafter referred to as "The Act"], but

(d) have received a graduate II-S deferment under said Act, as more fully appears in the ORDER DETERMINING THE VALIDITY OF CLASS ACTION, dated February 27, 1970;

2) Plaintiffs are all members of the above-defined class;

3) There are no material issues of fact; and

4) The Court has jurisdiction and plaintiffs are entitled to a judgment as a matter of law as more fully appears in the OPINION [2 SSLR 3524] filed herein and made a part hereof as if set out in full which contains further findings of fact and conclusions of law;

It Is Therefore Adjudged And Declared that plaintiffs and all others similarly situated are entitled to fatherhood III-A deferments as a matter of law pursuant to Section 6(h)(2) of the Act and Selective Service Regulation 1622.30(a) (32 C.F.R. §1622.30(a)), and therefore

It Is Hereby Ordered that:

a) Defendants classify plaintiffs Clements, Gregory, Hovis, Sharpless and Silverman III-A as of the date of this order;

b) Defendants classify all others similarly situated to plaintiffs III-A upon showing that they are members of the class as hereinbefore defined; and

c) Defendant Lewis B. Hershey and defendant State Directors Custer, Hammack, Holmes and Knight in exercising their functions under Section 10 of the Act conform to the declaratory judgment made herein.

In The

United States Court of Appeals
For The Sixth Circuit

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Stephen L. Gregory, et al.,

Plaintiffs-Appellees,

v.

Curtis W. Tarr, National Director of Selective Service, et al.,

Defendants-Appellants.

Decided and Filed January 26, 1971

OPINION

Before: Weick, McCree, and Brooks, Circuit Judges.

Weick, Circuit Judge. Plaintiffs filed a class action in the District Court challenging the application and validity of a Selective Service Regulation defining eligibility of draft registrants for what is known as a "fatherhood deferment" under deferment classification III-A.[1] The plaintiffs are draft registrants who have been re-classified I-A

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[1] Title 32, Code of Federal Regulations, section 1622.30 (January 1, 1970) provides, in pertinent part:

"(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their [sic] home and who is not a physician, dentist or verterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category.

(available for military service) and ordered to report for induction. The defendants are the National Director of Selective Service, the State Directors of Selective Service of the states of Michigan, Indiana, Illinois and Minnesota, and a number of local boards and their members in said states. The class sought to be protected is limited to Selective Service registrants who have one or more children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category, and who have a post-baccalaureate student deferment (graduate II-S), but have not received a pre-baccalaureate student deferment (undergraduate II-S), under authority of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U.S.C.A. App. §451 *et seq.* Plaintiffs seek a declaratory judgment that the challenged regulation is invalid, at least as it is presently applied, and a mandatory injunction ordering classification in Class III-A (fatherhood deferment) for themselves and the class they seek to protect. Plaintiffs also seek to have declared void the orders to report for induction which each of them has received. Jurisdiction is allegedly founded on 28 U.S.C.A. §§1331, 1343, 1361, & 2201-02.

The action was submitted to the court upon the plaintiffs' motion for summary judgment and the defendants' motion to dismiss for lack of subject-matter jurisdiction and, in the alternative, for failure to state a claim upon which relief could be granted. The court had previously determined, upon plaintiffs' motion, the validity of the class action. The district court filed an opinion granting the plaintiffs' motion for summary judgment in which it de-

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except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

The fatherhood deferment provided by 32 C.F.R. §1622.30(a) has been suspended by Executive Order 11,527 subsequent to the filing of the present case, but the order provides that those entitled to the deferment who requested it prior to the date of Executive Order shall still be entitled to it thereafter. Exec. Order No. 11,527, 35 F.R. 6571, 6572 (April 23, 1970).

termined that it had subject-matter jurisdiction over the action and that plaintiffs had presented an issue on which they were entitled to relief.[2] Defendants appeal from that judgment, contending that the federal courts are deprived of jurisdiction of this case by virtue of section 10 (b) (3) of the Military Selective Service Act of 1967 [hereinafter "the Act"], 50 U.S.C.A. App. §460(b) (3) and that the plaintiffs were properly denied fatherhood deferments under the authority of section 6(h) (2) of the Act, 50 U.S.C.A. App. §456 (h) (2), and the pertinent regulation, 32 C.F.R. §1622.30(a) (1970). We reverse.

In considering the 1967 Act, Congress was concerned about the decisions of some federal courts permitting earlier review of Selective Service decisions than had previously been thought permissible. Thus, Congress statutorily imposed the rule of judicial review which presently defines jurisdiction:

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[2] Defendants have not questioned the validity of the class action although no notice to the members of the class was given as provided by Rule 23, Fed. R. Civ. P., nor have they questioned the jurisdiction of the court over the State Directors of Selective Service, the Local Boards and their members for the states of Indiana, Illinois and Minnesota.

Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System.

In *Whitmore v. Tarr* (D. Neb. Civ. 1963L, decided October 22, 1970), the court held that it was bound by the decision of the District Court in the present case on the ground of res adjudicata and enjoined the induction of a Nebraska registrant. In *Germonprez v. Director of Selective Service* (D.D.C. Civ. 1855-70, decided July 8, 1970), the court issued a preliminary injunction restraining the induction of a Kansas registrant on the basis of the present case. Query: Suppose that the District Court in the present case had ruled that the plaintiffs and others similarly situated were not entitled to III-A classification. Would such a decision be binding on a registrant from another state who had no notice of the action nor opportunity to defend against it?

In *Pasquier v. Tarr* (W.D. La. Civ. 70-2056, decided October 14, 1970), the court declined to follow the decision of the district court in the present case.

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution [for refusing to report] after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 U.S.C.A. App. §460(b) (3) (1968).

As interpreted, the constitutionality of this provision has been upheld. *Clark v. Gabriel*, 393 U.S. 256 (1968). It has long been recognized that Congress has a legitimate interest in protecting from litigious delays and interruptions a governmental activity so inextricably intertwined with national security as the procurement and training of military personnel. *See, e.g. Falbo v. United States*, 320 U.S. 549 (1944). In interpreting section 10(b) (3) of the Act, however, the Supreme Court has held that a literal interpretation of the provision was not justified, in *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968). A literal reading would, in the first instance, suspend the constitutionality protected writ of habeas corpus. 393 U.S. at 238. The Court also concluded that Congress did not intend to preclude pre-induction judicial review in the special circumstances presented by *Oestereich* and *Breen v. Selective Serv. Bd.*, 396 U.S. 460 (1970).

In *Oestereich*, a divinity student who was unquestionably exempted by statute from eligibility for induction, was nonetheless reclassified I-A on the authority of the now-defunct delinquency regulations for having turned in his draft card in protest of the Vietnam War. Oestereich sought a permanent injunction prohibiting his induction. His complaint was dismissed by the district court for lack of jurisdiction under authority of section 10(b) (3), and the United States Court of Appeals for the Tenth Circuit

affirmed. The Supreme Court reversed, holding that pre-induction review was not precluded where the action of the local board was "blatently lawless" and beyond its statutory authority. *Breen* reaffirms the principle of *Oestereich* where a registrant had a statutory deferment rather than a statutory exemption and the delinquency regulations were used to punish him for a draft card turn-in.

Contemporaneous with *Oestereich*, the Court announced its decision in *Clark v. Gabriel*, *supra*, holding that pre-induction judicial review was not available, except as a defense to a criminal prosecution, where the local board exercised, as contemplated by the statutory scheme, its judgment and discretion in granting or withholding certain categories of deferments. Plaintiffs seek to bring their allegations within the *Oestereich-Breen* exception to section 10(b)(3). In order to determine which line of decisions will control the present controversy, it is necessary to pierce the pleadings and determine precisely what category is raised by the merits of this controversy. *Stella v. Selective Service Board*, 427 F.2d 887, 889 (2nd Cir. 1970).

The district court was of the opinion that it had jurisdiction since the question of whether the plaintiffs and the class they represent should be granted fatherhood deferments was not one committed to the discretion of the local boards and since no mixed question of law and fact or pure question of fact was presented to the Court for determination. The court then held that the regulation should be interpreted to refer only to undergraduate student deferments or, in the alternative, that the regulation was inconsistent with the Act. Having made this determination, the court upheld its jurisdiction since the action of the local boards was "basically lawless" under the proper view of the regulation and the Act. The plaintiffs support the district court's determinations by urging essentially two alternative grounds. They contend that, properly interpreted, the regulation denies fatherhood deferments only to those who have received *undergraduate* II-S deferment since the effective date of the Act. They offer two reasons for the suggested interpretation — that the ambiguity of the regulation should be construed to fit

the explicit statutory denial of fatherhood deferments to those having obtained undergraduate deferments or that the regulation was promulgated by the President under a mistaken view that the law required deferments to be denied all registrants having obtained a student deferment, whether graduate or undergraduate. We can see no reason to accept the plaintiff's invitation to interpret the regulation. It is plainly worded and appears in Title 32 immediately following the regulations regarding separate undergraduate and graduate student deferments, which were promulgated at the same time as the regulation in question. It is difficult to imagine, under these circumstances, how the Executive could have been unaware of the difference between undergraduate and graduate II-S deferment.

However, the plaintiffs also contend that the regulation is invalid if given its literal meaning as inconsistent with the statutory scheme. This strikes closer to our view of *Oestereich*, that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review except as a defense to a criminal prosecution. However, this case falls short of the mark. Under the new statutory scheme enacted in 1967, two new student deferment categories were created. Section 6(h) (1) of the Act provides that "the President *shall* . . . [defer] persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning. . . . A deferment granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree . . ." (emphasis added). However, the Act does not similarly create graduate or fatherhood deferments by its own force alone. Rather, in section 6(h) (2) of the Act, the President is *authorized* to provide for deferment of graduate students "under such rules and regulations as he may prescribe. . . ." The same paragraph further provides that:

> ". . . [T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment . . . *of any or all categories* of per-

sons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." (Emphasis added).

Thus, both the graduate student deferment and the fatherhood deferment are matters of Executive grace which can be made subject to any reasonable conditions, rather than matters of statutory right. The Executive has exercised its discretion to provide for both graduate deferments and fatherhood deferments, but has pre-conditioned the latter deferment on not having requested and received a graduate student deferment so as to preclude the "pyramiding" of deferments into complete exemption from military service. Clearly, the exercise of this discretion expressly bestowed upon it by Congress does not involve the Executive or the Selective Service System in conduct unauthorized by statute, as was envisioned by the Court in the *Oestereich* decision. To the contrary, *Oestereich* presented a situation where the Selective Service System attempted to exercise punitive powers which Congress had not given it, having already prescribed a set of criminal penalties for violation of the Act. Here, the Act expressly bestows upon the Executive the discretion the exercise of which is challenged.

The judgment of the district court is reversed, and the cause is remanded with instructions to dismiss the complaint.

Reversed.

APPENDIX D

UNPUBLISHED OPINIONS IN RELATED CASES

Opinions in cases adjudicating the identical issues presented in this case have been published in *Schrader v. Selective Service System Local Board No. 76*, 328 F. Supp. 891 (W.D. Wis. 1971) and 329 F. Supp. 966 (W.D. Wis. 1970), and *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1971). These opinions may be located conveniently in the published sources.

Opinions in *Zeilstra v. Hershey*, Civil No. 6251, W.D. Mich., S.D., Nov. 4, 1971, and *Schrader v. Selective Service System Local Board No. 76 of Wisconsin*, No. 71-1767, 7th Cir., July 28, 1972, have not yet been published and are set forth below.

United States of America in the District Court of the United States for the Western District of Michigan Southern Division

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Civil Action No. 6251

Edward R. Zeilstra,

Plaintiff,

v.

Lewis B. Hershey, National Director of Selective Service, Arthur A. Holmes, Michigan State Director of Selective Service, Allen J. Roush, Colorado State Director of Selective Service, Colorado Selective Service Local Board No. 13, Engelwood, Colorado (S. Charles Tobias, Robert Allshouse, R. L. Campbell, Joe R. Atencio, George T. Peterson), Michigan Selective Service Local Board No. 281, Grand Rapids, Michigan (Charles Wynn, Edward Southway, Albert Wiersma, Harm Westman, Charles Saur),

Defendants.

OPINION AND ORDER

Plaintiff filed the complaint in this action on January 13, 1970, claiming that he was a married Selective Service registrant who was a father and who had received a graduate but not an undergraduate II-S student deferment after June 30, 1967. He further claimed that he was entitled to a fatherhood III-A deferment under the applicable laws and regulations and that the defendants had denied him this deferment. He therefore prayed for a preinduction declaratory judgment, a writ of mandamus ordering that he be classified III-A and other appropriate relief.

On August 2, 1971, plaintiff was granted leave to amend his complaint. He thereupon petitioned this court for a declaration that the induction order under which he currently finds himself is invalid due to the defendants' failure to comply with a valid court order applicable to his case. Plaintiff's Motion for Summary Judgment is presently before the court on the amended complaint.

The defendants originally answered on or about April 15, 1970. Thereafter, by mutual agreement between the parties, the action was suspended pending the results in Gregory v. Tarr, 311 F. Supp. 1 (E.D. Mich. 1970). Gregory was a class action in which precisely the same issues as were here initially involved were at stake. The District Court in that case entered an order on February 27, 1970, declaring that the named plaintiffs in that action and all others similarly situated were entitled to the III-A deferment as a matter of law and ordered that both the named plaintiffs and all the members of the class be reclassified III-A as of the date of the order. Judge Talbot Smith's order directed that "defendants (including the National Director and the State Director of the Selective Service System, defendants herein) classify plaintiffs . . . (and) all others similarly situated to plaintiffs III-A upon showing that they are members of the class as hereinbefore defined." It further ordered that the National Director of Selective Service and defendant State Director "in exercising their functions under Section 10 of the Act (to) conform to the declaratory judgment made herein." In the case of plain-

tiff Zeilstra, this was not done, although he clearly showed that he was a proper member of the subject class. Both defendant National Director and defendant State Director had notice of the Gregory order, and both had notice of plaintiff Zeilstra's membership in this class through this action.

On July 7, 1970 the Government moved the Gregory court for a stay pending appeal. On August 17, 1970, that motion was denied. Although entitled to do so under Rule 8 of the Rules of Appellate Procedure, the Government did not move the Court of Appeals for a stay pending appeal. Instead, the defendants simply disregarded the District Court's order on their own initiative. Plaintiff Zeilstra was not reclassified III-A during the time that Judge Smith's order was in effect, nor was his induction order canceled, nor was his case reopened, although these steps were necessarily preparatory to reclassifying him III-A pursuant to the court's order. Selective Service Regulations Section 1625.2, 1625.14, and 1625.13.

Ultimately, the Court of Appeals for the Sixth Circuit reversed the District Court. Gregory v. Tarr, 436 F.2d 513 (1971). On March 26, 1971, this court entered an order setting this case over without date to await the results of the petition for certiorari in Gregory v. Tarr. On June 14, 1971, the United States Supreme Court, Mr. Justice Douglas dissenting, denied the petition for certiorari. (No. 1625, Oct. Term 1970).

Defendants presently stand before this court resisting plaintiff's Motion for Summary Judgment and advancing their own Motion for Dismissal on the grounds that this court, in light of Section 10b(3) of the Military Selective Service Act of 1967 and the Sixth Circuit decision in Gregory, lacks jurisdiction over the subject matter of this action.

It is clear that the Court of Appeals resolution of the Gregory case is dispositive of the merits of plaintiff's original claim of entitlement to a III-A Selective Service classification. Therefore, this court concedes that it is without power to order a III-A classification. However, the action

currently before the court assumes a different posture at the present time.

Plaintiff presently alleges that notwithstanding his ineligibility for preinduction review of his III-A classification claim, his current induction order may be declared legally invalid due to its roots in nondiscretionary lawless action by the defendants.

It is the considered judgment of this court that plaintiff does state proper grounds for review and that the induction order now pending in plaintiff's case is invalid.

While the Declaratory Judgment Act, 28 U.S.C. Sections 2201-03, and the Mandamus and Venue Act of 1962, 28 U.S.C. Section 1361, confer upon the court jurisdiction over the kind of matters raised by plaintiff's petition, ordinarily a federal court may not review the validity of an induction order issued by the Selective Service prior to the time of actual induction into the Armed Forces. The Military Selective Service Act of 1967, Section 10(b)(3), provides, in relevant part, that:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

Despite this general rule, however, the United States Supreme Court has ruled that preinduction review is appropriate where the action of Selective Service officials is "basically lawless." (See 393 U.S. at page 237.) Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968), and Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970).

Oestereich involved a divinity student whose exemption from service was mandated by Section 6(g) of the Selective Service Act; Breen an undergraduate student whose deferment was mandated by Section 6(h)(i). In both cases, plaintiffs had been reclassified as delinquent pur-

suant to regulations which the court found to be unauthorized by the Act.

The Supreme Court characterized the actions of the respective local boards as "basically lawless" and held that preinduction review would lie where "a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service." 396 U.S. at 467. Conversely, in Clark v. Gabriel, 393 U.S. 256 (1968), in a short per curiam opinion entered without argument, the court included that preinduction review would not lie vis a vis a local board's denial of a conscientious objector exemption, an act which "inescapably involves a determination of fact and an exercise of judgment." 393 U.S. at 258. The distinction sought to be drawn in these cases was clearly one between mandatory and discretionary acts, as Justice Harlan noted in his concurring opinion in Breen. 396 U.S. at 468.

The true essence of Breen and Oestereich is that preinduction review can and should be entertained, notwithstanding Section 10(b)(3), whenever the Selective Service System has been shown to have violated a mandatory legal duty. Many Circuits Courts of Appeal have recognized this principle. The largest number of cases involves the I-S deferment under Section 6(i) of the Act. Bowen v. Hershey, 410 F.2d 962 (1st Cir. 1969); Carey v. Local Board No. 2, 412 F.2d 71 (2nd Cir. 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); and Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969).

That the mandatory duty which gives rise to preinduction review must have statutory derivation cannot be soundly argued, however. The spirit, thrust and rationale of Breen and Oestereich point to the *nature* of the violated duty, not its source.

The order of a Federal District Court imposes a definite mandatory duty upon the persons addressed by that order at least as imperative as does a legislative act. Indeed, in the area of constitutionally protected free speech, the Su-

preme Court of the United States has ruled that court-imposed prior restraints must be obeyed as a pre-requisite to standing for subsequent challenge, whereas statutory prior restraints may be disregarded and subsequently attacked in court. See Walker v. City of Birmingham, 388 U.S. 307 (1967).

In Shea v. Mitchell, 421 F.2d 1162 (D.C. Cir. 1970), the court held that judicial review would lie because the "relevant law" focused upon in Breen as the source of the mandatory duty did not necessarily have to come from a statute.

> "Whether that 'law' involves statutes, court decisions, or regulations is as irrelevant as whether it involves an 'exemption' or a 'deferment.'" 421 F.2d at 1165-66.

In the present case, the plaintiff does not argue that the defendants misconstrued the statute in violation of an earlier court decision; he shows that defendants violated a specific court order directed at them, of which they knew and which they unsuccessfully sought to stay. No clearer mandatory duty and wilful breach thereof could be established.

Gregory v. Tarr, supra, was a valid class action brought pursuant to both subparagraphs (1) and (2) of Rule 23(b) of the Federal Rules of Civil Procedure. Judge Smith's order declared it to be so, and the Government chose not to appeal from that aspect of the case. Although that order was later reversed on the classification issue, as a member of the validly defined class, plaintiff Zeilstra was entitled to enforce the District Court's unstayed order during the period before the Sixth Circuit Court of Appeals decision. The government chose to ignore that order. It is well within the province of this court's power to review the implications for plaintiff's case of such a blatant and cavalier disobedience of a District Court's order in the defendants' classification and processing activities.

Even assuming that the Sixth Circuit decision in Gregory held that the District Court lacked jurisdiction, under

Section 10(b)(3), to issue its order, the defendants' duty to obey that order before its reversal was not retroactively extinguished. In United States v. Shipp, 203 U.S. 563 (1906), the Supreme Court, per Holmes, J., ordered trial on an information charging a contempt of an order of that court despite the defendants' argument that the Federal Courts had no jurisdiction in the matter for want of a federal question.

> "Even if the Circuit Court had no jurisdiction and if this court had no jurisdiction of the appeal, this court and this court alone could decide that such was the law." 203 U.S. at 573.

The Shipp case was resoundingly affirmed in United States v. United Mine Workers, 330 U.S. 258 (1947). In that case, John L. Lewis had violated an injunction of a Federal District Court on the ground that the Norris-LaGuardia Act deprived the court of jurisdiction to issue the injunction (just as in the Gregory case the question was whether Section 10(b)(3) barred judicial intervention). In affirming Lewis' contempt conviction, the Supreme Court held:

> "We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well the parties, was properly before the court; where the elements of Federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was thereof authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise." 330 U.S. at 294.

Significantly, the five-Justice majority which sustained the convictions in the Mine Workers case contained two Justices (Frankfurter and Jackson), who would have held

that the Norris-LaGuardia Act did, in fact, prohibit the courts from issuing the injunctions in question.

These cases recognize that the line between jurisdictional and non-jurisdictional defects is a difficult one to draw. The courts, not the parties, have the expertise to decide these questions. If a court has issued an order not "transparently invalid or (having) only a frivolous pretense to validity" (Walker, supra, at 315), then the parties should obey the order and not substitute disobedience for appeal . . . ."

Judge Smith's order in Gregory was not transparently invalid. The District Court considered very complicated arguments and arrived at a reasonable conclusion. The fact that the Court of Appeals subsequently disagreed did not render the District Court opinion frivolous.

Consequently, in light of the mandatory duties imposed by a valid Federal District Court's order upon defendants relevant to processing plaintiff Zeilstra's case, and in light of the apparent connection between the breach of those duties by defendants and the vitality of the induction order presently facing the plaintiff, this court finds that it has jurisdiction to review defendants' classification and processing activities (during the pendency of the valid and binding district court order) and to consider the validity of that induction order, even though plaintiff has not yet been inducted. Accordingly, defendants' Motion to Dismiss is hereby denied.

Turning, then, to plaintiff's induction order, it is plain that had defendants properly proceeded to comply in good faith with the District Court order in Gregory, the present induction order could not have survived. That order, still pending, is dated November 19, 1969, well before the District Court order in Gregory. The first step of compliance with the mandatory court order would necessarily have been to quash the induction order. Defendants' failure to so act renders that induction order defective and void.

It is a fundamental maxim of equity that equity regards as done that which ought to have been done. See 2 Pomeroy, Equity Jurisprudence, Sections 364-377 (5th ed. 1941). Recently, the Sixth Circuit Court of Appeals applied this equitable maxim in a case which, like the one at bar, involved disobedience to a court order. Candler v. Donaldson, 272 F.2d 374 (1959). The deceased holder of a life insurance policy was found to have changed the beneficiaries in violation of a court order in a divorce proceeding. The Sixth Circuit held, citing the equitable principle above-mentioned, that the divorced wife of the decedent was entitled to the proceeds of the policy as if the beneficiary had not been changed. See, also, Peckham v. Metropolitan Life Insurance Co., 415 F.2d 312 (10th Cir. 1969).

The courts have not been reluctant to extend this maxim into the area of administrative law. The Ninth Circuit has held that where the Federal Power Commission failed to process two pending cases together with the result that the plaintiff company was wrongfully deprived of a more advantageous power license, the court, applying the maxim, would award the company the more advantageous license. Montana Power Co. v. FPC, 330 F.2d 781 (9th Cir. 1964). Similarly, the maxim has been applied to uphold the ruling of an agency that a company will be deemed to have complied with a statute even though it has not. Central Maine Power Co. v. FPC, 345 F.2d 875 (1st Cir. 1965).

Defendants should have quashed the November 19, 1969 induction order for plaintiff Zeilstra. They refused to do this, despite their knowledge of a court order, valid and unstayed, good on its face, which directed them to do this. The court finds such refusal unlawful and declares that the surviving unquashed induction order of November 19, 1969, directed to plaintiff Zeilstra, is void and of no force and effect — this being the circumstance that would have resulted had defendants processed plaintiff's file as they were directed.

In so ruling, this court is not simply enforcing a court order which is no longer vital, nor conferring special equi-

table benefits upon the plaintiff for their own sake. This court makes no reference whatever to the appropriateness of a III-A classification in plaintiff's case at this time.

This court does hereby declare that the consequences of blatant acts of disobedience to a pending valid court order will not be recognized as lawful. Since the November 19, 1969 induction order in this case was such a consequence, it cannot be accorded legitimacy. Review of that order is, in the context of this case, appropriate, for the reasons detailed above. This court, having carefully examined the specific peculiar factual and legal issues raised by this case, declares that the November 19, 1969 induction order upon Edward R. Zeilstra is null and void and of no effect.

Plaintiff's Motion for Summary Judgment, insofar as it rests on plaintiff's challenge to the validity of his induction order, is granted.

It Is Therfore Ordered that defendants National Director of the Selective Service System, State Director of the Selective Service System, and the Local Draft Board quash the Induction Order upon Edward R. Zeilstra, dated November 19, 1969, and cease and desist from any attempt to enforce it.

Dated: November 4th, 1971.

Noel P. Fox,
Chief District Judge.

In The

United States Court of Appeals
For the Seventh Circuit

No. 71-1767 September Term 1971 — April Session 1972

Thomas T. Schrader,

Plaintiff-Appellee,

v.

Selective Service System Local Board No. 76
Of Wisconsin, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 70-C-345

James E. Doyle, Judge.

Argued June 7, 1972 — Decided July 28, 1972

Before Duffy, *Senior Circuit Judge*, Durfee,* *Associate Judge*, and Eschbach,* *District Judge*.

Duffy, *Senior Circuit Judge*. This is a suit by Thomas T. Schrader, a Wisconsin Selective Service registrant who sought, in District Court, a pre-induction judicial review

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* Associate Judge James R. Durfee of the United States Court of Claims is sitting by designation.

District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

of the refusal of his Local Board to grant him a III-A fatherhood deferment.

The Wisconsin District Court (Western District of Wisconsin) relying on a Michigan District Court's purported class-action judgment in *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich., 1969), issued a restraining order against the induction of the plaintiff in that case.

Following the reversal of the Michigan District Court's judgment by the Sixth Circuit Court of Appeals, the Government moved the Wisconsin District Court for a dissolution of the restraining order. However, the Wisconsin District Court, instead of dissolving the restraining order, entered an order enjoining the induction of the plaintiff unless the Local Board first reopened his classification. It is from this order that the United States Government take this appeal.

The facts are not in dispute. During the period from 1963 to June 1967, when plaintiff was an undergraduate student, he was granted a II-S student deferment. In September 1967 during his first year in law school, Schrader requested and received a II-S graduate student deferment.[1] Upon the expiration of that deferment, he requested and received a III-A hardship deferment. This deferment was subsequently extended to June 1, 1970. In June 1969, the plaintiff became a father and in October 1969, so informed his Board. When his III-A deferment expired in June 1970, plantiff requested a renewal thereof, and also requested a III-A deferment based upon his fatherhood status. These requests were denied following plaintiff's personal appearance before the Board. He was subsequently classified I-A.[2]

Plaintiff appealed from the denial of the III-A fatherhood deferment but the State Appeal Board affirmed that

[1] 50 U.S.C. App. 451 et seq.

[2] The basis of the rejection of the fatherhood claim was 32 C.F.R. 1622.30(a) which, at that time, provided the award of a fatherhood deferment to any registrant who had been classified in Class II-S after the enactment of the Military Selective Service Act of 1967.

classification. On November 23, 1970, plaintiff was informed by the Local Board that an order for him to report for induction was being placed in the mails.

In the *Gregory* (District Court) case, the plaintiffs, as a class, had each been granted II-S graduate deferments under the Military Selective Service Act of 1967. They contended they were entitled to a III-A fatherhood deferment notwithstanding the language of 32 C.F.R. 1622.30 (a) which denied fatherhood deferments to persons who had been "classified in Class II-S under the 1967 Act."

Furthermore, in *Gregory*, the plaintiffs claimed their suit was a class action. The Michigan District Court agreed with plaintiffs' claims, ruling plaintiffs must be classified as III-A instead of I-A as ordered by their representative Boards, and that the action was properly maintained as a class action.[3] The Government promptly appealed, and the Sixth Circuit reversed. *Gregory v. Tarr*, 436 F.2d 513 (6 Cir., 1971). The United States Supreme Court denied certiorari. (403 U.S. 922).

The difference between the status of plaintiff Schrader in the instant case and the plaintiffs in *Gregory* is that here, Schrader sought a III-A fatherhood deferment after the District Court had decided *Gregory* but prior to the reversal of that decision by the Court of Appeals.

The Wisconsin District Court ruled that *Gregory*, which judgment was binding on the parties to that suit, was a class action, and that plaintiff herein was a member of the *Gregory* class. Therefore, the District Court reasoned, the National Director of Selective Service was required to classify plaintiff in Class III-A although the plaintiffs in *Gregory* never had been thus reclassified.[4]

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[3] Court order determining the validity of the class action and judgment reported as *Gregory v. Hershey*, Civil Action No. 33057 (E.D. Mich. Feb. 27, 1970), 2 SSLR 3604.

[4] The District Court herein opined that during the interim when the *Gregory* District Court order was effective, the National Director was bound by the *Gregory* order to reclassify the III-A any registrant who made a showing that he was a member of the *Gregory* class. The District Court below reasoned that the failure of the National Director

Evidently the Wisconsin District Court, in this action, was under the impression that the determination by the Michigan District Court in *Gregory* was *res judicata* with respect to the validity of the class action. The *Gregory* District Court ruled that ". . . [N]otification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them. . . ." Thus, the *Gregory* court seemingly was under the impression that no notice to class members was required because of the permissive language of Rule 23(d)(2), F.R.C.P. However, we are of the opinion that the absolute failure to give any indicia of notice to absent members renders the purported class action in *Gregory* futile. The Michigan District Court in *Gregory* erred in not requiring notice to be given in some manner to absent class members, and the Wisconsin District Court erred applying the principle of *res judicata* to the *Gregory* ruling.

Certain authorities are of the opinion that notice is not required, as a matter of due process, when the class action is maintained under Rule 23(b)(1) or 23(b)(2), F.R.C.P. as was the *Gregory* action. However, the one Circuit Court of Appeals which has ruled on the requirement of notice when proceeding under the above-mentioned sections of Rule 23 held ". . . notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2 Cir., 1968).

We are of the opinion that the *Eisen*, *supra*, decision is the correct interpretation of the notice requirement for Rule 23(b)(1) and (b)(2). The more recent District Court opinions agree that pre-judgment notice is required

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to abide by the *Gregory* order was the same type of administrative lawlessness on the part of the Selective Service System as evidenced in *Oestereich v. Selective Service*, 393 U.S. 233 (1969). Therefore, the District Court was of the opinion that in this case as in *Oestereich*, *supra*, pre-induction judicial review, usually barred by Sec. 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. Sec. 460(b)(3), was warranted.

in all representative actions. *Pasquier v. Tarr*, 318 F. Supp. 1350, 1353 (E.D. La., 1970), aff'd. 444 F.2d 116 (5 Cir. 1971); *Zachary v. Chase Manhattan Bank, N.A.*, 52 F.R.D. 532 (S.D. N.Y. 1971).

In our view, the District Court proceedings in *Gregory* was not a valid class action and was not binding upon anyone except the named plaintiffs to that action. See *Pasquier v. Tarr, supra.* The Wisconsin District Court improperly applied the *Gregory* case to the case at bar under the principle of *res judicata.* We feel plaintiff is without standing to assert, with respect to his claim for a III-A deferment, that the National Director acted in a lawless manner in failing to reclassify him and others similarly situated.

We now consider, absent the effect of the *Gregory* class action before the Michigan District Court, whether the plaintiff herein has overcome the bar of Sec. 10(b)(3) which, except for well-distinguished exceptions, precludes pre-induction judicial review.

The Supreme Court recently stated in *Fein v. Selective Service System Local Board No. 7, Yonkers, N.Y.*, ... U.S. (1972) with respect to the meaning and reach of Sec. 10(b)(3) and the recent Court decisions considering pre-induction judicial review, at page .....:

> "Thus *Oestereich, Gabriel, Breen* and *Boyd* together establish the principles (a) that Sec. 10(b)(3) does not foreclose pre-induction judicial review in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute, and (b) that Sec. 10(b)(3) does foreclose pre-induction judicial review in the more common situation where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant. In the latter case the registrant's judicial review is confined — and constitutionally

so — to situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus."

The action taken herein by the Local Board in refusing a III-A classification to plaintiff Schrader had a statutory basis in Selective Service Regulation 1622.30(a). Evident from this regulation is the fact that registrants who have received a II-S graduate deferment are foreclosed from a III-A classification. Therefore, it cannot be maintained on appeal by the plaintiff that his local board clearly departed from its statutory mandate. *Oestereich, supra; Breen v. Selective Service Local Board No. 16, Bridgeport, Conn.*, 396 U.S. 460 (1970). Rather, the reclassification of plaintiff Schrader to I-A was well within the statutory authority of the Selective Service System, and involved an exercise of their discretion which cannot be interfered with by court action before induction. *Clark v. Gabriel*, 393 U.S. 256 (1968); *Fein v. Selective Service Local Board No. 76, Yonkers, N.Y., supra; Edwards v. Selective Service Local Board No. 111*, 432 F.2d 287 (5 Cir. 1970); *McCarthy v. Director of Selective Service System*, F.2d (No. 71-1144, 5/26/72, 7 Cir., 1972).

The Wisconsin District Court failed to establish any deprivation of a classification to which plaintiff Schrader would be statutorily entitled. We hold, therefore, the plaintiff's instant suit for pre-induction judicial relief was and is barred by Sec. 10(b)(3).

As our Court recently stated in a per curiam opinion, *McCarthy v. Director of Selective Service System, supra*, with respect to Sec. 10(b)(3):

> "In conclusion, it deserves emphasis that the purity of the legal question submitted to a court is not the detriment of whether the bar of Section 10(b)(3) may be circumvented. *Fein* makes this much abundantly clear. Now Section 10(b)(3) is understood to mean what it says except in such highly unusual and strictly limited circumstances as were present in *Oestereich* and *Breen*."

Such circumstances are not present in this case.

The order of the Wisconsin District Court dated July 20, 1971, is reversed and the District Court is instructed to vacate its prior orders enjoining the induction of the plaintiff herein. Plaintiff Schrader was improperly included in the *Gregory* class, and pre-induction judicial review was improperly granted in this action by the Wisconsin District Court.

Reversed and remanded for further action pursuant to this opinion.[5]

REVERSED AND REMANDED.

ESCHBACH, District Judge, dissenting.

The defendants here, through the actions of their National Director, violated a specific federal court order, directed at them, of which they were aware and which they unsuccessfully sought to stay at the district court level. I know of no government agency or any other litigant who is permitted to deliberately disregard with impunity a nonfrivolous federal court order. I therefore agree with the court below that the Selective Service System's utter disregard of the mandate issued in *Gregory v. Hershey*, 311 F. Supp. 1 (E.D. Mich. 1970) was "lawless," and I must respectfully dissent.

In *Gregory v. Hershey, supra*, Judge Smith determined there was a valid class action pursuant to both subparagraphs (1) and (2) of FED. R. CIV. P. 23(b). The Government did not appeal the class action determination by Judge Smith, but they did obtain a reversal on the district court's interpretation of Selective Service Regulation 1622.30(a). *See Gregory v. Tarr*, 436 F.2d 513 (6th Cir. 1971), *cert. denied*, 403 U.S. 922 (1971). The plaintiff in this action, however, as a member of the defined class in *Gregory v. Hershey, supra*, was entitled to enforce the dis-

[5] The reversal of the District Court order is on jurisdictional grounds and is not intended to preclude or have a res judicata effect on whatever post-induction defenses plaintiff may have.

trict court's unstayed order during the period before the Sixth Circuit Court of Appeals' decision.

The majority in this action have now determined that because of the lack of notice to absent class members in *Gregory v. Hershey, supra,* there never existed a valid class to which plaintiff Schrader could belong. Even accepting the wisdom of requiring notice in all representative actions under FED. R. CIV. P. 23(b)(1) and (2), I do not find that determination dispositive in this case. At the time plaintiff Schrader requested reclassification from the Wisconsin Local Board, he was unquestionably a member of that class defined in *Gregory, supra.* Furthermore, at that time there was a final, unstayed decision of a federal district court mandating the National Director of the Selective Service System to classify all members of that class III-A. Not only did the National Director flagrantly disregard this mandate, but the Local Boards also proceeded to induct into the armed services those members of that class, including plaintiff, who were to be reclassified under that court order.

Even assuming the factual situation most favorable to these defendants, viz., that the defendants justified their refusal to reclassify plaintiff on two federal district court decisions which held *Gregory, supra,* not binding on absent class members,[1] such reliance is not legal excuse for defendants' disregard of the federal court order. It is an immutable principle that if a competent court has issued an order "not transparently invalid or [having] only a frivolous pretense of validity, then the parties should obey the order and not substitute disobedience for appeal. . . ." *Walker v. City of Birmingham,* 388 U.S. 307, 315 (1967). *See also Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 179 (1968); *United States v. United Mine Workers,* 330 U.S. 258, 294 (1947); *United States v. Shipp,* 203 U.S. 563, 573 (1906). There has been no suggestion that

[1] *Pasquier v. Tarr,* 318 F. Supp. 1350 (E.D. La. 1970, aff'd, 444 F.2d 116 (5th Cir. 1971); *McCarthy v. Director of Selective Service,* 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd on other grounds,* No. 71-1144 (7th Cir., May 26, 1972).

Judge Smith's determination of a proper class action was frivolous. Furthermore, the court below and the court in *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1970), correctly concluded that courts of collateral jurisdiction are bound by the pronouncements of the initial forum's determination regarding the class and are not free to attack the class nature of the suit once it has been judicially determined. Therefore, those cases finding *Gregory, supra*, inapplicable to absent class members should have accepted Judge Smith's factual determination and refrained from relitigating that issue. In fact, had the National Director properly carried out the unstayed mandate of *Gregory, supra*, those cases, including this one, which reopened the class action determination by Judge Smith, would have never existed — at least until *Gregory* was reversed on appeal. If the National Director disagreed with the decision of the district court in *Gregory*, his sole remedy lay with the Sixth Circuit Court of Appeals.[2]

The Sixth Circuit Court of Appeals in reversing *Gregory, supra*, noted that class actions enjoining the induction of others similarly situated throughout the nation can have "a far reaching and disruptive effect on the operation of the Selective Service System." *Gregory v. Tarr*, 436 F.2d 513, 514 n.2 (6th Cir. 1971). I would agree. However, the answer to the broad and sometimes gargantuan effects of this type class suit is not to ignore the order because it is found too pervasive. The remedy lies in limiting the power of a federal district court by amending the all-encompassing provisions of FED. R. CIV. P. 23.

The issue in question here concerns more than the induction of plaintiff Schrader. The deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based.

I would affirm.

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[2] The National Director unsuccessfully sought a stay of the district court's mandate in *Gregory, supra*, at the district level but did not seek a stay from the Sixth Circuit pursuant to Fed. R. App. P. 8.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-309

HOWARD MARK SANDLER, PETITIONER

v.

NATIONAL DIRECTOR OF SELECTIVE SERVICE, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 44-46) is not yet reported. The opinions of the district court (Pet. App. 28-38, 38-44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1972, and a timely petition for rehearing was denied on July 5, 1972. The petition for a writ

of certiorari was filed on August 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 10(b)(3) of the Military Selective Service Act bars pre-induction judicial review of the denial of a fatherhood deferment to petitioner.

2. Whether a decision of another district court in a class action, holding that registrants in petitioner's situation were entitled to fatherhood deferments—which decision the court of appeals reversed prior to the decision of the district court in the present case—authorized the district court here to entertain the present suit despite Section 10(b)(3).

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Acts of 1967 and 1971, 50 U.S.C. App. 460(b)(3), provides in pertinent part:

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

32 C.F.R. 1622.30(a) (Jan. 1, 1970) provided:

> In Class III-A shall be placed any registrant who has a child or children with whom he main-

tains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

STATEMENT

While petitioner was an undergraduate at college from 1963 to June 1967, he was granted a II-S student deferment under the then existing Selective Service law.[1] In September 1967, during his first year in graduate school, he was granted a II-S student deferment under the Military Selective Service Act of 1967, 50 U.S.C. App. 451, *et seq.* (1964 ed., Supp. V), which had been enacted on June 30, 1967. Upon the expiration of his II-S deferment in November 1968, petitioner was classified I-A.

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[1] Universal Military Training and Service Act, 50 U.S.C. App. 451, *et seq.* (1964 ed.). That Act was amended in 1967 and the name was changed to the Military Selective Service Act of 1967 (P.L. 90-40, 81 Stat. 100); in 1971, the Act was again amended and the name changed to the Military Selective Service Act of 1971 (P.L. 92-129, 85 Stat. 348).

In December 1969, petitioner requested a III-A deferment based upon his fatherhood status. The board, however, refused this request on the ground that he had received a II-S deferment after June 30, 1967, while a graduate student. The basis for this ruling was 32 C.F.R. 1622.30(a), which, at the relevant time,[2] precluded a fatherhood deferment to any registrant who had been "classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 * * * [June 30, 1967]."

Petitioner requested reconsideration. He claimed he was a member of the class covered by the Michigan district court's decree in the class action of *Gregory* v. *Hershey*, 311 F.Supp. 1 (E.D. Mich., judgment entered, February 27, 1970, 51 F.R.D. 188). The Michigan court had ruled that fathers who had received II-S deferments under the 1967 Act while graduate students, rather than as undergraduates, could not be denied fatherhood deferments under 32 C.F.R. 1622.30(a). Since the induction of such registrants claiming fatherhood deferments had been enjoined by the Michigan district court, petitioner argued that the Selective Service System was bound by that ruling.

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[2] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, terminated the III-A fatherhood deferment and 32 C.F.R. 1622.30(a) as cited above was revoked by that order. However, this change did not apply to persons, such as petitioner, who claimed eligibility prior to that date. All references herein to 32 C.F.R. 1622.30(a) are to the regulation as it stood prior to that change: 32 C.F.R. 1622.30(a) (January 1, 1970).

The local board, treating petitioner's request for reconsideration as an appeal, forwarded his file to the Appeal Board, which upheld the I-A classification. On December 2, 1970, petitioner was mailed an order to report for induction on January 28, 1971. On December 17, 1970, his case was specially reviewed by the National Director of Selective Service, who advised the State Director that petitioner "is not eligible for Class III-A (paternity) deferment. Until such time as the *Gregory* v. *Hershey* case is resolved by higher court action it would appear Mr. Sandler has been properly classified and processed" (Pet. 5).

On January 22, 1971, petitioner brought the instant action in the district court in Maryland to enjoin his induction, and to obtain mandatory and declaratory relief. Four days later, on January 26, 1971, the Sixth Circuit reversed *Gregory* v. *Hershey*, *supra*. *Gregory* v. *Tarr*, 436 F. 2d 513, certiorari denied, 403 U.S. 922. The district court, in the present case, after issuing a temporary restraining order in July, 1971, granted the government's motion to dismiss the complaint, on the basis of the Sixth Circuit's reversal of *Gregory* v. *Hershey* (Pet. App. 28-38). Petitioner moved to amend the judgment on the ground that although the *Gregory* district court decision had been reversed, Selective Service officials were bound by that judgment until it was reversed and could not, until then, order him to report for induction.

The district court denied the motion (Pet. App. 38-44). It ruled that the order in *Gregory* had no effect outside the jurisdiction of the court that entered it, and also that pre-induction judicial review of the plaintiff's complaint was barred by Section 10(b)(3) of the Military Selective Service Act. The Fourth Circuit affirmed *per curiam* (Pet. App. 44-46).

ARGUMENT

1. Petitioner does not deny—as the Sixth Circuit correctly held in the *Gregory* case—that Section 10(b)(3) bars pre-induction judicial review of the denial of his fatherhood deferment. That section precludes such review of the "classification or processing of any registrant by local boards" except as a defense to a criminal prosecution initiated after a registrant has responded to an induction order. This Court has recognized that, despite the literal sweep of this provision, it does not bar pre-induction review of classifications whose effect is to deny a registrant either an exemption or a deferment which the statute expressly gives him. *Oestereich* v. *Selective Service Board*, 393 U.S. 233; *Breen* v. *Selective Service Board*, 396 U.S. 460. In reaffirming those decisions last Term (*Fein* v. *Selective Service System*, 405 U.S. 365, 376), the Court stated that those decisions permit pre-induction judicial review only "in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or deferment, deprives the registrant of the clas-

sification to which, otherwise and concededly, he is entitled by statute * * *" (*id.* at 374-375).

Under that test, the Court concluded that Fein's challenges to the constitutionality of the administrative procedures by which his conscientious objector claim had been denied, did not come within this narrow exception to Section 10(b)(3). This was so, the Court ruled, because unlike the classification of the registrants in *Oestereich* and *Breen*, whose "claimed status * * * was factually conceded and thus was assured by the statute upon objective criteria," Fein's "administrative classification action was, in contrast, a product of the 'process' and the 'system of classification'" (405 U.S. at 376).

The courts below correctly concluded that Section 10(b)(3) similarly bars pre-induction judicial review of the denial of petitioner's fatherhood deferment. As in *Fein*, the local board's action did not deny the registrant any statutory status to which he was concededly factually entitled. The Selective Service System interpreted and applied its regulation to deny a fatherhood deferment to a registrant who had received a student deferment after June 30, 1967, whether as an undergraduate or as a graduate student. The denial of petitioner's deferment was thus not "based on reasons unrelated to the merits of the claim to exemption or deferment" and did not deprive him of the "classification to which, otherwise and concededly, he is entitled by statute" (*Fein*, *supra*, 405 U.S. at 374-375). To the contrary, the denial of petitioner's fatherhood deferment, like the denial of

Fein's conscientious objector claim, was "a product of the 'process' and the 'system of classification'" (*Fein*, *supra*, 405 U.S. at 376). Accordingly, it was not subject to pre-induction judicial review.[8]

2. Petitioner argues, however, that Section 10(b)(3) does not bar his suit because he is challenging not the denial of his fatherhood deferment but only the action of the Selective Service System in issuing him an induction order at a time when the district court judgment in *Gregory* was still outstanding. Petitioner's induction order had been stayed, however, and when the court of appeals reversed in *Gregory*—four days after he filed his suit—petitioner, like the plaintiffs in *Gregory* and all other members of that class, was subject to immediate induction. Petitioner concedes (Pet. 12), as he must, that he is not now entitled to a fatherhood deferment on the basis of any *res judicata* effect of the *Gregory* district court decision. Similarly, he cannot rely upon that decision to justify a pre-induction challenge to the denial of his fatherhood deferment while refusing to recognize that, as a result of the court of appeals' reversal, that judgment "collapsed" and was of no further effect (*Pasquier* v. *Tarr*, 444 F. 2d 116, 117 (C.A. 5)).

The court of appeals' ruling that in these circumstances Section 10(b)(3) bars pre-induction review

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[8] Petitioner argues that the bar of Section 10(b)(3) can be avoided by bringing an action in the nature of *mandamus* under 28 U.S.C. 1361. *Fein*, however, was a suit under 28 U.S.C. 1361, *inter alia*. See 405 U.S. at 366.

of the denial of petitioner's fatherhood deferment is in accord with the consistent line of decisions rejecting similar attempts by registrants who are not parties to the *Gregory* suit to rely upon the reversed district court decision in that case to avoid induction. In addition to the decision below, see *Zeilstra* v. *Tarr*, (C.A. 6) No. 72-1131, decided August 24, 1972; *Schrader* v. *Tarr*, C.A. 7, No. 71-1767, decided July 28, 1972 (Pet. App. 74). See, also, *McCarthy* v. *Director*, 460 F. 2d 1089 (C.A. 7); *Pasquier* v. *Tarr*, *supra*.[4] There is no occasion for further review of that ruling.

3. Finally, the issue has but limited importance. It involves only a narrow category of registrants—those who (a) were denied fatherhood deferments because they received a student deferment after June 30, 1967, while a graduate student and (b) were issued an induction order while the *Gregory* decision was pending on appeal. The number of registrants so situated necessarily is extremely small. Moreover, the fatherhood deferment was terminated in 1970. See n.2, p. 4, *supra*.

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[4] *Hunt* v. *Local Board*, 438 F. 2d 1128 (C.A. 3), cited by petitioner, is of dubious validity since that court relied on the district court decision in *Gregory* v. *Hershey*, *supra*, which was subsequently reversed. The Fifth Circuit decision in *Plotner* v. *Resor*, 446 F. 2d 1066, also cited by petitioner, was withdrawn by that court on rehearing, the appeal was dismissed as moot, and the panel's opinion at 446 F. 2d 1066 was decreed "to have no precedential value" (*per curiam* opinion, No. 31030, August 18, 1972). *Crowley* v. *Pierce*, 4 SSLR 3118 (M.D. Fla.), upon which petitioner also relies, was recently reversed, 461 F. 2d 614 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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